262 N.C. App.—No. 2 Pages 156-375

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*MAY 29, 2020*

**MAILING ADDRESS: The Judicial Department**
**P. O. Box 2170, Raleigh, N. C. 27602-2170**

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# OF
# NORTH CAROLINA

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ROBERT N. HUNTER, JR.[10]

[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Died 28 August 2015. [4]Died 3 May 2015. [5]Died 30 January 2017. [6]Died 4 January 2015. [7]Died 27 January 2015. [8]Died 11 September 2015. [9]Resigned 24 March 2019. [10]Retired 1 April 2019.

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# COURT OF APPEALS

## CASES REPORTED

### FILED 6 NOVEMBER 2018



## CASES REPORTED WITHOUT PUBLISHED OPINIONS

leave a driver's license office and became belligerent with employees. A Division of Motor Vehicles inspector revoked defendant's implied consent when he told defendant to leave the office. **State v. Nickens, 353.**

**Second-degree—jury instructions—extra words included—**The trial court did not err in a second-degree trespass prosecution where the indictment alleged that a Division of Motor Vehicles inspector was a "person in charge" of the premises but the instruction included the additional words "a lawful occupant, or another authorized person." The list of people who can tell a defendant not to remain on the premises in the applicable statute was merely a disjunctive list of descriptors, not additional theories. Substantial differences in the extra descriptors used in this case could not be determined from the plain words of the statute. **State v. Nickens, 353.**

**ZONING**

**Conditional use permit—denied by city council—de novo review by superior court—**In a conditional use case involving the building of a hotel, the superior court review of a city council decision to deny the permit appropriately applied de novo review to determine the initial legal issue of whether petitioner had presented competent, material, and substantial evidence. The superior court's order showed that it did not weigh the evidence. **PHG Asheville, LLC v. City of Asheville, 231.**

**Conditional use permit—hotel—harmony with neighborhood—**Petitioner's "use or development" of a property for a hotel established a prima facie case of harmony with the area or neighborhood under the city's Uniform Development Ordinance (UDO). Although the city contended that "use" should be distinguished from "development" in the UDO, petitioner's expert witness established a prima facie case of harmony of the use and development within the area. **PHG Asheville, LLC v. City of Asheville, 231.**

**Conditional use permit—hotel—traffic—**Although the city argued in a zoning action involving a conditional use permit for a hotel that petitioner did not establish a prima facie case that the proposed hotel would not cause undue traffic congestion or create a traffic hazard, no competent, material, and substantial evidence was presented to refute an analysis from petitioner's expert traffic engineer. The speculations of lay members of the public and unsubstantiated opinions of city council members did not constitute competent evidence to rebut the expert. **PHG Asheville, LLC v. City of Asheville, 231.**

**Conditional use permit—prima facie entitlement—impact on adjoining property—material evidence—**A petitioner seeking a conditional use permit for a hotel presented material evidence to the city council about the hotel's impact on adjoining property. Petitioner's expert testimony had a logical connection to whether the project would impair the value of adjoining property and the city council's lay notion that the expert's analysis was based upon an inadequate methodology did not constitute competent rebuttal evidence. **PHG Asheville, LLC v. City of Asheville, 231.**

**Conditional use permit-city council decision—findings—judicial review—individual findings not specifically addressed—**The trial court did not misapply the standard of review in a zoning case involving a conditional use permit for a hotel where it did not specifically address each of the city council's 44 findings because no competent, material, and substantial evidence was presented to rebut petitioner's prima facie showing. The council's 44 findings were unnecessary, improper, and irrelevant. **PHG Asheville, LLC v. City of Asheville, 231.**

## SCHEDULE FOR HEARING APPEALS DURING 2020

## NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

APPALACHIAN MATERIALS, LLC, PETITIONER
v.
WATAUGA COUNTY, A NORTH CAROLINA COUNTY, RESPONDENT, AND TERRY COVELL, SHARON COVELL AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., D/B/A HIGH COUNTRY WATCH, INTERVENORS

No. COA18-188

Filed 6 November 2018

**Zoning—land use ordinance—high-impact land use—asphalt plant—definition of "educational facility"**

An application for construction of an asphalt plant was improperly denied because of its proposed location within 1,500 feet of a central administrative office for the county's schools. Based on the plain language of the ordinance, the administrative office did not meet the definition of "educational facility" and thus the asphalt plant was not prohibited at that location.

Judge DILLON concurring in result only by separate opinion.

Appeal by petitioner from order entered 8 September 2017 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 22 August 2018.

*Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for petitioner-appellant.*

*Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for respondent-appellee.*

DAVIS, Judge.

This case requires us to construe a single provision of a Watauga County land use ordinance prohibiting the construction of an asphalt plant within 1,500 feet of an "educational facility." Although this appeal arises in the zoning context, the resolution of this issue provides this Court with an opportunity to reiterate fundamental principles of statutory interpretation applicable to the construction of any law or ordinance.

Appalachian Materials, LLC, ("Appalachian") appeals from the trial court's order upholding the denial of its application for a High Impact Land Use ("HILU") permit. The trial court affirmed the denial of Appalachian's permit because the proposed asphalt plant site was located within 1,500 feet of the Margaret E. Gragg Education Center

(the "Gragg Center"), a building that serves as the central administrative office for the Watauga County Schools. Because we conclude that the Gragg Center does not qualify as an "educational facility" based on the plain language of the ordinance's definition of that term, we reverse the trial court's order.

**Factual and Procedural Background**

In March 2003, Watauga County adopted an "Ordinance to Regulate High Impact Land Uses" (the "HILU ordinance") in all unincorporated areas of the county. The ordinance was adopted "for the purpose of promoting the health, safety and general welfare of the citizens of Watauga County" by regulating certain land uses that "by their very nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, and other impacts upon the lands adjacent to them." One such regulated use concerned the location of asphalt plants. Pursuant to the HILU ordinance, an asphalt plant "shall not be within 1,500 feet of a public or private educational facility, a [North Carolina] licensed child care facility, a [North Carolina] assisted living facility, or a [North Carolina] licensed nursing home." In addition, no applicant wishing to build an asphalt plant is permitted to proceed with construction without having first received a permit from the Watauga County Department of Planning and Inspections.

On 10 November 2013, Appalachian began leasing an 8.5 acre tract of land located along Rainbow Trail in Watauga County upon which it intended to construct and operate an asphalt plant. Appalachian subsequently hired Derek Goddard, the vice-president of Blue Ridge Environmental Consultants, to plan, design, and obtain any necessary permits for the proposed asphalt plant site.

On 9 September 2014, Goddard emailed Joseph Furman, the director of the Watauga County Planning and Inspections Department, to inquire whether Furman could provide him with a map displaying all of the buffers required by the HILU ordinance. The following day, Furman replied by sending Goddard via an email attachment a map (the "HILU map") containing the heading "High Impact Land Use Spacing." The HILU map purported to depict facilities in Watauga County subject to the ordinance's spacing requirements and displayed a 1,500-foot buffer zone around each such facility. The HILU map did not indicate that the site of Appalachian's proposed asphalt plant was within 1,500 feet of any facility implicated by the HILU ordinance. The Gragg Center was not indicated on the map as being subject to the ordinance's spacing requirements.

On 15 June 2015, Appalachian submitted a High Impact Land Use Development Permit Application to the Watauga County Planning and Inspections Department in which it sought approval to construct and operate an asphalt plant in the vicinity of Rainbow Trail. In his capacity as director of the Planning and Inspections Department, Furman denied Appalachian's permit application on 22 June 2015. Furman explained his reasoning for denying the application, in relevant part, as follows:

> According to Article II, Section 3(G) Spacing Requirements, the nearest portion of the premises of an asphalt plant may not be established within 1,500 feet of a public or private educational facility. The [Gragg Center] is clearly within 1,500 feet of the premises of this asphalt plant based upon our review of the application.

On 17 July 2015, Appalachian appealed Furman's decision to the Watauga County Board of Adjustment (the "Board") pursuant to N.C. Gen Stat. § 160A-388(b1). Sharon and Terry Covell, homeowners whose property was located next to the proposed asphalt plant, and the Blue Ridge Environmental Defense League, Inc. subsequently filed motions to intervene as parties to Appalachian's appeal. A hearing on the motions to intervene and on Appalachian's appeal was held before the Board beginning on 14 October 2015. The Board first heard evidence on the two motions to intervene and granted both motions. The Board then received evidence with regard to Appalachian's appeal of the denial of its permit application.

Scott Elliot, the superintendent of Watauga County Schools, testified at the hearing concerning the various functions of the Gragg Center. Elliot stated that the Gragg Center served as the central office for Watauga County Schools as well as the meeting place for the Watauga County Board of Education. He further testified that the building primarily housed administrative personnel responsible for coordinating and implementing the education curriculum for the entire Watauga County Schools system. In addition, Elliot stated that professional development training for teachers, student testing, and the Watauga County Spelling Bee also took place at the Gragg Center.

On 30 October 2015, the Board issued a decision upholding Furman's denial of Appalachian's permit application. In its decision, the Board made the following pertinent findings of fact:

> 2. The [Gragg Center] is located within 1500 feet from the nearest portion of the building, structure, or outdoor storage used as part of the premises for the proposed asphalt plant.

> 3. The [Gragg Center] meets the requirements for an Education Facility as defined in the High Impact Land Use Ordinance.

Appalachian sought review of the Board's decision in Watauga County Superior Court on 2 December 2015 by means of a petition for *certiorari*. Following a hearing on 14 August 2017, the Honorable R. Gregory Horne entered an order on 8 September 2017 affirming the Board's decision. Appalachian filed a timely notice of appeal to this Court.

**Analysis**

Although Appalachian has raised several arguments, we need address only the question of whether the Gragg Center is an "educational facility" as that term is defined by the HILU ordinance because that issue is dispositive of this appeal. This Court has held that "[a] legislative body such as the Board [of Adjustment], when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. Of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (citation omitted), *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). A board of adjustment's decision "shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388." N.C. Gen. Stat. § 160A-381(c) (2017). We have described the superior court's role in reviewing the decision of a local board as follows:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

*Dellinger v. Lincoln Cty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (citation omitted), *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016).

"If a petitioner appeals an administrative decision on the basis of an error of law, the trial court applies *de novo* review; if the petitioner

alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 367, 713 S.E.2d 511, 514 (2011) (citation and quotation marks omitted). A reviewing court "does not make findings of fact, but instead, determines whether the Board of Adjustment made sufficient findings of fact which are supported by the evidence before it." *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (citation omitted).

Our Supreme Court has held that "[t]he rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) (citation omitted). A basic tenet of statutory construction is that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Furthermore, courts should "give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc., v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and quotation marks omitted).

As noted above, the HILU ordinance provides that "[t]he location of asphalt plants . . . shall not be within 1,500 feet of a public or private educational facility[.]" The version of the HILU ordinance in effect during the time period relevant to this appeal defined "educational facility" as follows:

> Educational Facility — Includes elementary schools, secondary schools, community colleges, colleges, and universities. Also includes any property owned by those facilities used for educational purposes.[1]

Thus, the first sentence of the definition lists five specific entities. Each of the five is a specific type of school or educational institution. Under the *expressio unius est exclusio alterius* canon of statutory construction, "the expression of one thing implies the exclusion of another."

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1. The HILU ordinance has since been amended on multiple occasions. The version of the ordinance currently in effect defines an "educational facility," in pertinent part, as "[e]lementary schools, secondary schools, community colleges, colleges, and universities, including support facilities such as administration for all of the preceding."

*Jeffries v. Cty. of Harnett*, __ N.C. App. __, __, 817 S.E.2d 36, 50 (2018). *See Evans v. Diaz*, 333 N.C. 774, 780, 430 S.E.2d 244, 247 (1993) ("[W]hen a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." (citation omitted)); *Jolly v. Wright*, 300 N.C. 83, 89, 265 S.E.2d 135, 141 (1980) ("[W]hen certain things are specified in a statute, an intention to exclude all others from its operation may be inferred." (citation omitted)), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). Thus, because the Gragg Center is not an elementary school, a secondary school, a community college, a college, or a university, it does not come within the first sentence of the definition.

The second sentence of the definition provides that the meaning of the term "educational facility" extends to "any property owned by *those facilities* used for educational purposes." (Emphasis added.) Clearly, the phrase "those facilities" refers to the entities listed with specificity in the first sentence. It is undisputed that the Gragg Center is not owned by an elementary school, secondary school, community college, college, or university and is instead owned by the Watauga County Board of Education. Thus, the Gragg Center likewise fails to qualify as an "educational facility" under the second sentence of the definition.

Watauga County nevertheless argues that a ruling that the Gragg Center does not fit within the definition of "educational facility" would "subvert the goal and spirit of the HILU" and "create an absurd or illogical result." It further contends that although the Gragg Center is not itself a school, its various uses are essential to the operation of the Watauga County Schools system.

The County's argument, however, runs counter to basic principles of statutory construction. As explained above, it is axiomatic that where the language of a statute or ordinance is clear and unambiguous this Court "does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation and quotation marks omitted). Given that the Gragg Center is neither one of the entities listed in the first sentence of the definition nor is it property owned by one of those entities, our analysis must necessarily end there.

While the County asks us to accept its representation that the definition contained in the ordinance was intended to encompass buildings such as the Gragg Center, our determination of the intent underlying this provision must be based on the words actually contained therein. *See*

*Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) ("If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms[.]" (citation omitted)). This Court lacks the authority to engage in the exercise of guessing what additional types of buildings the County *might* have meant to encompass within this definition where doing so would require us to substitute language of our own choosing for the words actually used in the ordinance itself. *See In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) ("When the language of a statute is clear and unambiguous . . . the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (citation omitted)).

Moreover, with regard to the County's position that the adoption of the interpretation advocated by Appalachian would lead to an absurd result, this argument fails for two reasons. First, there is nothing "absurd" about a local government's decision to prohibit the placement of high impact land uses near actual schools that serve as places of instruction for students on a regular basis while permitting such uses near primarily administrative facilities such as the Gragg Center.

Second, and more fundamentally, our Supreme Court has made clear that courts are not permitted to avoid a so-called "absurd result" by rewriting a statute or ordinance in order to reach a more "logical" meaning. *See Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (the clear meaning of a statute "may not be evaded by . . . a court under the guise of construction. We will not engage in judicial construction merely to assume a legislative role and rectify what defendants argue is an absurd result." (internal citations and quotation marks omitted)).

Finally, the County makes the argument that a ruling in favor of Appalachian would render the second sentence of the definition meaningless because elementary and secondary schools are not authorized to own property. As an initial matter, counsel for Appalachian conceded at oral argument that colleges and universities are, in fact, legally permitted to own property. Thus, by Appalachian's own admission, the second sentence actually does possess some meaning in that property owned by those entities would fall within the definition as long as said property was being used for educational purposes.

This argument fails for a more basic reason as well. Even if the second sentence of the definition did not actually encompass any additional specific locations within Watauga County other than those enumerated

in the first sentence, this Court would still lack a license to engage in the legislative function of rewriting this sentence in accordance with our own subjective belief as to what other locations might be deserving of protection from nearby asphalt plants. *See Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 264 ("It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures." (citation and quotation marks omitted)), *disc. review denied*, 356 N.C. 160, 568 S.E.2d 189 (2002).

The definition of "educational facility" in the HILU ordinance does not mention the Watauga County Board of Education. Had the County intended for any building owned by the Board of Education possessing some type of educational purpose to be encompassed within the ordinance's definition, it would have been a simple matter to say so in the definition itself. But language to this effect does not exist.

Were we to accept the County's invitation to effectively add new words to this provision of the ordinance, we would be creating a new definition out of whole cloth rather than interpreting the one that is currently before us. This we cannot do. Courts do not possess the authority to insert language into an ordinance or statute that *could* have been included therein but was not. *See Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ("[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." (citation omitted)). Simply put, in construing the HILU ordinance this Court lacks the authority to add words that the drafters themselves left out.

The concurrence ultimately reaches the correct result in this case but does so by using a mode of statutory construction that is at odds with the rules of interpretation discussed above. Rather than apply the language that the drafters of the HILU ordinance actually used, the concurrence instead plucks out of thin air the phrase "physical locations" and makes it the focal point of its analysis — despite the fact that such a phrase appears nowhere in the definition of "educational facilities." Based largely on this invented terminology, the concurrence mistakenly concludes that the second sentence of the definition (1) lacks any meaning at all as actually worded; and (2) can only be given meaning by the addition of language the drafters themselves did not see fit to add.

With regard to the first proposition, the concurrence employs a mode of construction that can only be described as odd. While it is axiomatic that courts should strive to find meaning in a statutory provision based on the words used therein, *see State v. Williams*, 286 N.C. 422, 431, 212

S.E.2d 113, 119 (1975) ("[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." (citation omitted)), the concurrence does the precise opposite — instead opting for a method of interpretation guaranteed to render the plain language of the second sentence of the definition at issue meaningless.

As for its second conclusion, by means of judicial sleight-of-hand the concurrence sees fit to change the phrase "property owned by [the entities listed in the first sentence]" to the quite different phrase "property owned by *the owners of* [the entities listed in the first sentence]." The concurrence's assertion of authority to add new language to the ordinance's definition under the guise of interpretation finds no refuge in the jurisprudence of our appellate courts. Moreover, its interpretation is rendered illogical by virtue of the fact that the Watauga County Board of Education *does not own* community colleges, colleges, or universities located within the county's borders.

The concurrence's assurance that its interpretation would give effect to Watauga County's "obvious intent" in drafting the HILU ordinance is also puzzling since there is simply no evidence to suggest that this was, in fact, the County's intent. To the contrary, the plain language employed in the definition suggests that this was not the drafters' intent at all. Guided by nothing more than its own subjective belief as to what would have constituted a wise definition, the concurrence violates the cardinal rule of statutory construction that prohibits courts from assuming a legislative role. *See Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) ("When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." (citation and quotation marks omitted)).

* * *

Words matter — be they contained in an ordinance, statute, contract, will, deed, or any other document possessing legal significance. Our holding today is not the result of a hypertechnical reading of the HILU ordinance. Rather, it applies longstanding principles of statutory construction by relying on the ordinance's plain language, which simply does not lend itself to the interpretation sought by the County in this appeal. Accordingly, we hold that the trial court erred in affirming the Board's decision to uphold the denial of Appalachian's permit application.

**Conclusion**

For the reasons stated above, we reverse the 8 September 2017 order of the trial court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge ELMORE concurs.

Judge DILLON concurs in result only by separate opinion.

DILLON, Judge, concurring in result only.

I. Background

Appalachian Materials, LLC, applied for a permit to build an asphalt plant within 1,500 feet of the administrative offices of the Watauga County Board of Education (the "BOE"). Watauga County denied the permit, in part, because its ordinances do not allow any property to be developed as an asphalt plant if that property is located within 1,500 feet of an "educational facility," concluding that the BOE property is an "educational facility" under the ordinance.

When Appalachian Materials applied for its permit, the term "educational facility" was defined by the County ordinance as follows:

> Educational facility – includes elementary schools, secondary schools, community colleges, colleges, and universities. Also includes any property owned by those facilities used for educational purposes.

I agree with the majority that the BOE property does not meet this definition of "educational facility." The majority, though, bases its conclusion on the fact that the BOE property is not "owned by [any of] those facilities " referenced in the first part of the definition. I base my conclusion, however, on the fact that the BOE property is not property "used for educational purposes."

II. Rules of Construction

In construing a statute or ordinance, our Supreme Court has instructed that our "goal" is "to accomplish the legislative **intent**." *Wilkie v. Boiling Springs*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (emphasis added).

"The best indicia of that intent are **the language** of the [ordinance]." *Id.* (emphasis added). And the general rule is that "[w]here the language of the statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using **its plain meaning**." *Id.* (emphasis added).

However, our Supreme Court has also instructed that "a statute must be construed, if possible, **to give meaning and effect to *all* of its provisions**," and that an interpretation which would render a provision "**meaningless . . . is not permitted**." *HCA Crossroads v. N.C. Dept. of Hum. Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) (emphasis added).

For example, in *Teachy v. Coble Dairies*, our Supreme Court refused to construe the 1975 version of Rule 14(c) of our Rules of Civil Procedure by the plain meaning of certain words used by our General Assembly because "were [those words] interpreted strictly and literally, [the provision] would be nugatory." *Teachy v. Coble Dairies*, 306 N.C. 324, 330, 293 S.E.2d 182, 186 (1982). Rather, our Supreme Court determined that these words constituted a "clerical error" and that to apply a strict construction would "thwart the obvious legislative intent and [would] render [the act] meaningless." *Teachy*, 306 N.C. at 331, 293 S.E.2d at 186. The Court did not apply the plain meaning, reasoning that construing an act in a manner which would render it meaningless "would be anomalous, aberrant, and abhorrent." *Id.*

III. Analysis of the Watauga County Ordinance

The definition of "educational facility" is plainly describing physical locations; that is, physical locations near which an asphalt plant cannot be developed. The plain meaning of the word "facility" is *a physical location*; the term "facility" is never used in English parlance to describe *an entity* which owns a physical location.

The definition of "educational facility" is broken up into two parts.

The first part is plainly describing physical locations used either as an elementary or secondary school or as a college or university, near which an asphalt plant may not be developed. It is plainly *not* describing school entities in the abstract. For instance, the term "universities" as used here would include the Appalachian State University campus, not the University entity. I agree with the majority that the BOE property does not fit the first part of the definition of "educational facility." The BOE property is not a facility used as a school or college.

The second part further defines an "educational facility" as "property owned by those facilities [referenced in the first part] used for educational purposes." The majority reasons that the BOE property is not a "property owned by those facilities [referenced in the first part of the definition] because the BOE property is not owned by an elementary or secondary school or by a college or university." I reason that the BOE property is not being "used for educational purposes."

I conclude that adopting a construction based on the plain reading of the language used in the second part would render the second part meaningless. Under North Carolina law, a real estate "facility" cannot own real property; only people and entities are capable of owning real property. The majority, though, suggests that a construction based on the plain language would not render the second part meaningless because some of the "facilities" in the first part are capable of owning property; for example, "universities" are capable of owning property. The majority essentially suggests, however, that the word "facilities" may be read to also refer to abstract entities, not just to physical locations. However, this suggestion ignores the plain meaning of the word "facilities." Further, it ignores a plain reading of the first part as referring only to physical locations, not to abstract entities. "Appalachian State University" may sometimes refer to a physical location in Boone: "I am heading to ASU this weekend to watch a football game." "Appalachian State University" may also refer an abstract entity: "I work for Appalachian State University." But the term "universities," as used in the first part, plainly refers only to physical locations, not to abstract entities.

Therefore, since construing the second part by giving the language used therein its plain reading would render the second part meaningless, as "facilities" cannot own property, we must adopt a construction, if possible, to give effect to County's obvious intent.

Since "facilities" themselves are not capable of owning real estate, I conclude that the County's obvious intent was to include within the definition "property owned by [**the owners of**] the facilities [referenced in the first part]." For example, the definition includes not only property used as an elementary and secondary school, but also other property owned by *the owner of* any elementary and secondary school used to educate students from that school. Here, the BOE owns the public elementary and secondary schools in the County. I conclude that the intent was to include within the scope of "educational facilities" not only the elementary and secondary school locations owned by the BOE, but also any other locations owned by the BOE where public school students participate in educational activities.

Under the majority's construction, "educational facilities" could only include off-site locations owned by a college, university, or private school entity. Since public schools are not owned by separate school entities, but rather by the BOE, the majority's construction would not include any off-site facility used to educate students attending public schools. I do not think it was the County's obvious intent to include only off-site facilities used to educate private school students.

In any event, I believe that the BOE property is not being used for "educational purposes" as that phrase is used in the ordinance. The term "educational purposes" is a bit ambiguous. If read broadly, "educational purposes" could include, for example, property used as a gravel pit owned by the BOE where the income generated was used to fund education. But to the extent the term is ambiguous, we are to construe it narrowly. *See Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138-39, 431 S.E.2d 183, 188 (1993) ("Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof.").

I construe "educational purposes" narrowly, to include only those facilities which are primarily used for activities where students are present. Indeed, this construction fits the context: The first part of the definition generally describes locations *primarily used* for activities *where students are present*. The evidence in the record demonstrates that the BOE property is used primarily for administrative purposes, and that the BOE property is only sporadically used for events where students are present. Therefore, I concur in the majority's result.

**BOONE FORD, INC. v. IME SCHEDULER, INC.**

[262 N.C. App. 169 (2018)]

BOONE FORD, INC., D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, PLAINTIFF
v.
IME SCHEDULER, INC., A NEW YORK CORPORATION, DEFENDANT
AND
CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, PLAINTIFF
v.
BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, DEFENDANT

No. COA16-750-2

Filed 6 November 2018

**1. Appeal and Error—preservation of issues—failure to act below**

The appellants (IME Scheduler and Cash for Crash) did not preserve for appeal the issue of whether the trial court erred by denying a motion notwithstanding the verdict on a conversion claim where there was no motion for directed verdict at the close of all the evidence.

**2. Appeal and Error—inconsistent verdict—no motion for a new trial**

The argument that a jury verdict was inconsistent was overruled in an action involving multiple claims relating to funds transferred between the parties where the appropriate motion (for a new trial) was never made.

**3. Contracts—negligent representation claim—directed verdict**

The trial court did not err by granting a directed verdict for plaintiff in a negligent misrepresentation claim in an action involving funds transferred between the parties where the evidence, taken in the light most favorable to the moving party (defendants), did not establish that plaintiff owed defendants any separate duty of care beyond that of the contractual relationship. Moreover, any error was harmless.

Appeal by IME Scheduler, Inc., and Cash for Crash, LLC ("appellants"), from judgment entered 1 March 2016 by Judge William H. Coward and order entered 21 April 2015 by Judge Jeff Hunt in Watauga County Superior Court. Originally heard in the Court of Appeals 25 January 2017. By opinion issued 18 April 2017, a divided panel of this Court, ___ N.C. App. ___, 800 S.E.2d 94 (2017), vacated Judge Hunt's 21 April 2015 consolidation order and remanded to the superior court for two separate

trials, therefore declining to reach appellants' arguments as to Judge Coward's 1 March 2016 judgment. By opinion issued 17 August 2018, our Supreme Court, ___ N.C. ___, 817 S.E.2d 364 (2018), reversed and remanded the case to this Court to address those remaining arguments.

*Miller and Johnson, PLLC, by Nathan A. Miller, for defendant-appellant IME Scheduler, Inc., and plaintiff-appellant Cash for Crash, LLC.*

*Walker Di'Venere Wright, by Anné C. Wright, for plaintiff-appellee and defendant-appellee Boone Ford, Inc.*

ELMORE, Judge.

Previously, a divided panel of this Court, *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. App. ___, 800 S.E.2d 94 (2017) ("*Boone Ford I*"), vacated Judge Hunt's pretrial consolidation order, which effectively set aside the jury verdict and vacated Judge Coward's final judgment, and "remand[ed] the cases to superior court[,]" *id.* at ___, 800 S.E.2d at 98, for two separate trials. The majority panel thus determined its "holding and disposition render[ed] moot the other issues [as to the propriety of Judge Coward's judgment] raised on appeal." *Id.* The dissenting judge reasoned that because Judge Hunt's pretrial consolidation order was interlocutory, it was not binding when Judge Coward presided over the jury trial, and because neither appellants moved to sever the cases but proceeded with the consolidated trial, they failed to preserve their argument for appellate review and awarding them a new trial was unwarranted. *Id.* at ___, 800 S.E.2d at 99 (Dillon, J., dissenting).

On 17 August 2018, our Supreme Court reversed our decision in *Boone Ford I* and remanded "to consider other issues that [our] decision did not reach." *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. ___, ___, 817 S.E.2d 364, 368 (2018). Appellants' remaining arguments were that (1) "the trial court and the trier of fact erred in denying C[ ]ash for Crash, LLC's motions in regards to the conversion allegation and in determining that Boone Ford, Inc. had not converted C[ ]ash for C[r]ash, LLC's money"; (2) "[t]he jury's finding in paragraph 25(1) of the Judgment and Order for Costs [was] inconsistent with the entirety of paragraph 25 of the Judgment and Order for Costs"; and (3) "[t]he trial court erred in granting . . . Boone Ford, Inc.'s motion for a directed verdict denying . . . IME Scheduler, Inc.'s negligent misrepresentation claim under N.C. R. Civ. P. 50." After careful review, we affirm Judge Coward's judgment.

## *I. Background*

The facts and trial procedure of this case are more fully discussed in our prior opinion. Relevant for addressing the remaining issues on remand, after Boone Ford sued IME Scheduler for the failed Raptor transaction, IME Scheduler filed counterclaims against Boone Ford alleging, *inter alia*, unfair and deceptive trade practices ("UDTP") and negligent misrepresentation. Cash for Crash also sued Boone Ford alleging, *inter alia*, a claim of conversion.

After IME Scheduler's case-in-chief, the trial court granted Boone Ford's motion for a directed verdict on IME Scheduler's negligent misrepresentation claim. After the presentation of all evidence, the jury rendered a verdict finding that Boone Ford did not convert the money wired from Cash for Crash and thus found Boone Ford not liable on Cash for Crash's conversion claim. The trial court later denied Cash for Crash's oral motion for a judgment notwithstanding the verdict ("JNOV") on that claim. In its verdict sheet in response to questions concerning IME Scheduler's UDTP claim, the jury also found that Boone Ford had wrongfully retained $40,385.50 from IME Scheduler, that this act was in and affecting commerce, but that Boone Ford's conduct did not proximately cause injury to IME Scheduler. Additionally, in response to the question "[i]n what amount has IME been injured?" the jury answered "$0.00."

Based on the jury's findings that Boone Ford was entitled to $20,000.00 in compensatory damages from IME Scheduler due to fraud, and that Boone Ford was entitled to $50,000.00 in punitive damages from IME Scheduler due to UDTP, the trial court on 1 March 2016 entered a final judgment and order for costs awarding Boone Ford $70,000.00 in total damages from IME Scheduler.

## *II. Analysis*

In *Boone Ford I*, appellants raised the following three issues we declined to address based upon our disposition of their first issue: (1) whether the trial court erred by denying Cash for Crash's motion for JNOV on its conversion claim against Boone Ford, (2) whether the jury's findings on IME Scheduler's UDTP claim against Boone Ford were inconsistent, and (3) whether the trial court erred by granting Boone Ford's directed verdict motion on IME Scheduler's negligent misrepresentation claim.

### A. Cash for Crash's Motion for JNOV as to its Conversion Claim

**[1]** Appellants first contend the jury erroneously found that Boone Ford did not unlawfully convert the $206,596.00 wired from Cash for Crash

and, on this basis, that the trial court erred by denying Cash for Crash's motion for JNOV on its conversion claim. This argument is not preserved for appellate review.

North Carolina Civil Procedure Rule 50(b)(1) requires a party to move for a directed verdict at the close of evidence to preserve the right to move for JNOV. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2017); *see also id.* official cmt. ("[M]aking an appropriate motion for a directed verdict is an *absolute prerequisite* for the motion for judgment NOV." (emphasis added) (citations omitted)). Stated differently, "a motion for [JNOV] must be preceded by a motion for directed verdict at the close of all the evidence." *Graves v. Walston*, 302 N.C. 332, 338, 275 S.E.2d 485, 489 (1981) (interpreting N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (1979)).

Here, although Cash for Crash made an oral motion for JNOV on its conversion claim immediately after the jury returned its verdict, the transcript reveals it never moved for a directed verdict on that claim and thus waived its right to move for JNOV. *See*, *e.g.*, *Graves*, 302 N.C. at 338, 275 S.E.2d at 489 ("In the present case, plaintiffs did not move for directed verdict at the close of plaintiffs' evidence or at the close of all the evidence. Plaintiffs thus had no standing after the verdict to move for [JNOV] and for that reason the trial court was without authority to enter [JNOV] for plaintiffs."). Therefore, Cash for Crash's "JNOV arguments are waived on appeal." *Martin v. Pope*, ___ N.C. App. ___, ___, 811 S.E.2d 191, 195 (2018); *see also Tatum v. Tatum*, 318 N.C. 407, 408, 348 S.E.2d 813, 813 (1986) ("Plaintiff failed to move for a directed verdict at the close of all the evidence. Therefore, plaintiff failed to preserve her right to move for [JNOV]." (citing *Graves*, 302 N.C. at 338, 275 S.E.2d at 489)).

### B. Damage Calculation as to IME Scheduler's UDTP Claim

**[2]** Appellants next challenge the jury's verdict as to IME Scheduler's UDTP claim against Boone Ford and, relatedly, the amount of compensatory damages awarded to Boone Ford. They argue that because "[t]he jury found that Boone Ford, Inc. had wrongfully retained IME Scheduler's $40,385.50 and that Boone Ford, Inc.'s act was in and affecting commerce[,]" the jury's finding that Boone Ford's conduct was not a proximate cause of injury to IME Scheduler was "inconsistent . . . and should be overturned." Appellants contend further that because the jury found Boone Ford was entitled to $32,000.00 in actual damages from IME Scheduler, "the only appropriate judgment would be to award IME Scheduler, Inc. at least the difference between the amount wrongly retained by Boone Ford, Inc. and the amount awarded to Boone Ford,

Inc. which at a minimum would be $8,385.50." Thus, appellants request on appeal that this Court

> reverse the jury's conclusion that IME Scheduler, Inc. was damaged as a result of Boone Ford Inc.'s wrongful retention of IME Scheduler Inc.'s money and either make a finding that IME Scheduler, Inc. should be awarded the amount of $8,385.50 or that a new trial limited to the exact amount of damages due to IME Scheduler, Inc. pursuant to IME Scheduler, Inc.'s claim for [UDTP] be held.

Appellants have failed to cite to any relevant legal authority to support these arguments. N.C. R. App. P. 28(b)(6). Nonetheless, we disagree with their contentions and decline their requests for appellate relief.

The challenged portion of the verdict sheet reads as follows:

> 25. [ ]Did Boone do or commit at least one of the following:
>
> 1. [W]rongly retain IME's $40,385.50 or any portion thereof? (if "yes", answer the following question)
>
> Answer: Yes.
>
> - Was that conduct in commerce or affecting commerce? (if "yes", answer the following question)
>
> Answer: Yes.
>
> • Was that conduct a proximate cause of injury to IME?
>
> Answer: No.

Additionally, in response to the related verdict sheet question on this claim "[i]n what amount has IME been injured?" the jury answered "$0.00."

"Where the jury's answers to the issues are allegedly contradictory, a motion for a new trial under Rule 59 is the appropriate motion." *Walker v. Walker*, 143 N.C. App. 414, 421, 546 S.E.2d 625, 630 (2001) (citing *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947)). Here, because IME Scheduler never moved for a new trial on its UDTP claim, "the question of whether the [jury's] verdict was inconsistent was not properly preserved for review on appeal." *Id.* at 422, 546 S.E.2d at 630; *see also* N.C. R. App. P. 10(a)(1). Further, a jury finding that a party committed an UDTP act does not compel a finding that that act proximately caused injury. IME Scheduler does not challenge the trial court's proximate cause instruction and, as reflected, the jury neither found that

Boone Ford's conduct proximately caused injury to IME Scheduler nor that IME Scheduler suffered any monetary damages as to its UDTP claim. IME Scheduler's failed UDTP claim provides neither a basis for offsetting the compensatory damages awarded to Boone Ford, nor for ordering a new trial on the issue of damages as to that claim. Accordingly, we overrule this argument.

### C. Directed Verdict of Cash for Crash's Negligent Misrepresentation Claim

**[3]** Last, appellants assert the trial court erred by granting Boone Ford's directed verdict motion on IME Scheduler's negligent misrepresentation claim. We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)). A directed verdict is proper only where "it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id.* (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). Recovery in tort arising out of a breach of contract is generally barred by North Carolina's economic loss rule:

> [A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

*Rountree v. Chowan Cty.*, ___ N.C. App. ___, ___, 796 S.E.2d 827, 830 (2017) (quoting *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30–31 (2007); other citation omitted). Where parties were privy to a contract, a viable tort action "must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties." *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 69, 502 S.E.2d 404, 407–08 (1998) (quoting *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983)).

Here, the trial court submitted both IME Scheduler's and Boone Ford's breach of contract and fraud claims to the jury but granted both parties' motions for directed verdict on their negligent misrepresentation claims. "The tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (quoting *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000)). The evidence, taken in the light most favorable to IME Scheduler, failed to establish that Boone Ford owed IME Scheduler any separate duty of care beyond that of the contractual relationship. IME Scheduler's negligent misrepresentation claim was barred by the economic loss rule. Accordingly, we affirm the trial court's ruling.

As a secondary matter, we note that even had the trial court erred by directing verdict on IME Scheduler's negligent misrepresentation claim, it would not be grounds for appellate relief in this case. N.C. Gen. Stat. § 1A-1, Rule 61 (2017) ("[N]o error . . . in any ruling . . . is ground[s] for granting a new trial or setting aside a verdict . . . , unless refusal to take such action amounts to the denial of a substantial right."). Boone Ford's trial position was that the parties contracted for the Raptor with the VIN number ending in 6435, while IME Scheduler's position was that they contracted for the Raptor with the VIN number ending in 7953. To prevail on its negligent misrepresentation claim, IME Scheduler was required to prove as alleged that, inter alia, it justifiably relied on Boone Ford's alleged false representation as to which Raptor was under contract. *Walker*, 211 N.C. App. at 30, 712 S.E.2d at 244.

The jury's finding that "the parties enter[ed] a contract with the terms contended by Boone" establishes that IME Scheduler's reliance on Boone Ford's alleged false representation would have been unjustified. *Cf. Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1410 (11th Cir. 1998) ("In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, *as a matter of law*, to establish that his reliance is justifiable." (citations omitted)). Accordingly, even if IME Scheduler's negligent misrepresentation claim should have been submitted to the jury, any error arising from the ruling was harmless. *See, e.g.*, *Sledge v. Miller*, 249 N.C. 447, 453–54, 106 S.E.2d 868, 874 (1959) (holding the trial court's refusal to submit the issue of damages for trespass was harmless where "[t]he finding of the jury that defendants were the owners of the land from which the

timber was cut negatived plaintiff's claim of trespass and defeated his claim for damages").

### *III. Conclusion*

Because the trial court properly denied Cash for Crash's motion for JNOV on its conversion claim against Boone Ford, the compensatory damages awarded Boone Ford were supported by the jury's verdict, and the trial court properly granted Boone Ford's directed verdict motion on IME Scheduler's negligent misrepresentation claim, we affirm the trial court's judgment.

AFFIRMED.

Judges DILLON and ZACHARY concur.

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LEWIS SCOTT CARLTON AND THOMAS P. WOOD, PLAINTIFFS
v.
BURKE COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA18-62

Filed 6 November 2018

**1. Appeal and Error—preservation of issues—sovereign immunity—not argued below**

Defendant, a county board of education, did not preserve for appellate review the issue of whether sovereign immunity barred a negligent infliction of emotional distress claim where the issue was not argued below. The question of whether the invasion of privacy claim would be barred by sovereign immunity was not addressed for reasons stated elsewhere in the opinion.

**2. Emotional Distress—negligent infliction—duty owed**

Plaintiffs produced sufficient evidence that defendant (a county board of education) owed a duty to plaintiffs where plaintiffs brought an issue to defendant's attention through written documents marked as confidential and with the assurance of the chairperson that confidentiality would be maintained, and those documents became public.

**3. Emotional Distress—negligent infliction—breach of duty—sufficiency of evidence**

Plaintiffs presented sufficient evidence that defendant (a county board of education) breached its duty to them in an action for negligent infliction of emotional distress arising from plaintiffs' confidential complaint to defendant about the superintendent of the school board where the complaint became public. The superintendent ultimately filed a lawsuit against plaintiffs.

**4. Emotional Distress—negligent infliction—foreseeability—sufficiency of evidence**

Plaintiffs presented sufficient evidence of the reasonable foreseeability of emotional distress in an action for the negligent infliction of emotional distress arising from the disclosure of plaintiffs' confidential complaint to a school board about the school superintendent. Defendant's motion to dismiss an invasion of privacy claim was not considered because the jury awarded the full amount to both plaintiffs and did not divide the amount between the two claims.

**5. Appeal and Error—preservation of issues—lost profits—motion in limine—appeal argued on different grounds**

Defendant (a county board of education) did not preserve for appeal the issue of lost profits in an action arising from a confidential complaint to defendant about a school superintendent and a defamation action. Defendant did not base its motion in limine on the same grounds argued on appeal.

**6. Emotional Distress—instructions—theory—included in pleading**

The trial court did not err in a negligent infliction of emotional distress action by instructing the jury on failure to secure information. The negligent act plaintiffs brought forward at trial was within the pleadings.

**7. Appeal and Error—motion for new trial—basis—inflammatory and irrelevant evidence—not raised at trial—not warranting new trial**

The trial court correctly denied defendant's motion for a new trial where defendant alleged that highly inflammatory and irrelevant evidence had been admitted. Of the five instances cited by defendant, three were not raised at trial and the other two did not warrant a new trial.

**8. Costs—motions for dismissal—properly denied—costs denied**

The trial court did not err by awarding costs in a negligent infliction of emotional distress action where defendant's motions to dismiss were properly denied.

Appeal by Defendant from order entered 6 June 2016 by Judge Yvonne Mims Evans and judgment entered 12 October 2016 and order entered 22 November 2016 by Judge W. Todd Pomeroy in Burke County Superior Court. Heard in the Court of Appeals 4 September 2018.

*Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellees.*

*Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog and Meredith Taylor Berard, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Burke County Board of Education ("Defendant") appeals following jury verdicts finding Defendant liable for negligent infliction of emotional distress and invasion of privacy. On appeal, Defendant argues the trial court committed the following errors: (1) denying its motion to dismiss based on sovereign immunity; (2) denying its motion to dismiss for failure to state a claim, motion for directed verdict, and motion for judgment notwithstanding the verdict; (3) denying its motion for new trial; and (4) awarding Plaintiffs costs and expenses. We affirm.

## I. Factual and Procedural Background

On 29 July 2014, Lewis Scott Carlton and Thomas P. Wood ("Plaintiffs") filed a complaint for invasion of privacy, breach of contract, negligent infliction of emotional distress, and civil conspiracy.[1] Plaintiffs asserted Defendant waived its right to assert sovereign immunity by purchasing liability insurance coverage. The complaint alleged the following narrative.

On 28 March 2011, Wood attended a "closed" session of a Burke County Board of Education ("Board") meeting. Speaking on behalf of himself and Carlton, Wood addressed the Board "about a highly confidential matter." The Board asked him to submit the information in a

1. Plaintiffs initially included Dr. Arthur Stellar as a defendant, but dismissed, without prejudice, their claims against Stellar on 17 March 2016.

written statement. Through its chairperson,[2] Defendant "represented . . . it would maintain the confidentiality" of the information.

On 11 April 2011, Plaintiffs "confidentially" sent envelopes to every member of the Board. In each envelope, Plaintiffs included a letter and "supporting documentation." All papers were placed "under seal[,]" with "Confidential" written on the envelope. (Emphasis in original). In the letter, Plaintiffs "raised serious concerns" about the superintendent of the Board, Dr. Arthur Stellar. Specifically, Plaintiffs alleged Stellar engaged in an "improper relationship" with Amy Morgan, a Board employee. Had Defendant not assured Plaintiffs of confidentiality, Plaintiffs "would never have submitted said materials[.]"

A member of the Board gave a copy of the letter and supporting documents to Stellar. In August 2011, Stellar gave a copy to Morgan. On 11 August 2011, the Board voted to "buy out" Stellar's contract, and Morgan resigned from her position in the school system.

On 31 October 2011, Morgan sued Plaintiffs for libel. As a result of the lawsuit, Plaintiffs "were viciously and maliciously attacked in the media and on the internet." Plaintiffs feared for their safety, suffered damage to their reputations and businesses, suffered severe mental and emotional distress, and spent "large sums" of money defending themselves in the Morgan lawsuit. On 1 April 2013, a court dismissed Morgan's lawsuit.

On 14 October 2014, Defendant filed a motion to dismiss, pursuant to Rule 12(b)(1)-(2), (4)-(6) of the Rules of Civil Procedure. After a hearing on 20 January 2015, the court entered an order on 10 February 2015 on Defendant's motion to dismiss pursuant to Rule 12(b)(6). The court dismissed Plaintiffs' breach of contract claim. The court denied Defendant's motion on the invasion of privacy, negligent infliction of emotional distress, and civil conspiracy claims.

On 16 March 2015, Defendant filed its answer. Defendant raised the defenses of contributory negligence, sovereign immunity, and expiration of the statute of limitations.

On 20 May 2016, Defendant filed a notice of hearing for 31 May 2016 on its motion to dismiss pursuant to Rule (12)(b)(1)-(2). That same day, Defendant filed an affidavit by Keith Lawson, its finance officer. Lawson asserted Defendant did not waive the defense of sovereign immunity as to the invasion of privacy claim by purchasing liability insurance.

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2. The complaint did not state who chaired the Board.

Lawson highlighted specific portions of Defendant's insurance policy, which covered only bodily injury and property damage caused by an accident. The policy, as explained by Lawson, did not cover "Personal and advertising injury[,]" including "Knowing Violation Of Rights of Another" or any injury arising from "Oral or written publication, in any manner, of material that violates a person's right to privacy[.]" Defendant attached its insurance policy as an exhibit to the affidavit.

On 31 May 2016, the court held a hearing on Defendant's motion to dismiss. Plaintiffs objected to the court's consideration of Lawson's affidavit and accompanying attachments.[3] Plaintiffs asserted Defendant violated Rule 26(c) of the Rules of Civil Procedure because Defendant did not list Lawson as a person with knowledge of the matter in its answer to Plaintiffs' request for interrogatories. Defendant argued it only waived sovereign immunity to the extent its insurance covered the claims. Defendant further asserted its insurance policies did not cover intentional torts.

In an order entered 6 June 2016, the court sustained Plaintiffs' objection to consideration of Lawson's affidavit and accompanying attachments. The court also concluded: (1) Defendant should have disclosed the identity of Lawson and the insurance policy earlier in discovery; (2) the "unseasonable" disclosure prejudiced Plaintiffs; (3) the late disclosure deprived Plaintiffs of the opportunity to depose Lawson; and (4) Defendant violated Rules 26, 33, and 34 of the Rules of Civil Procedure. Accordingly, the court denied Defendant's motion to dismiss pursuant to Rule (12)(b)(1)-(2).

The court called the case for trial on 20 September 2016.[4] Plaintiff Wood testified on his own behalf. Wood lived in Burke County and owned a photography business. Wood had two school-aged children and was "[v]ery active" in their education. At a Board meeting in January 2011, Wood heard rumors about Stellar closing the schools in Burke County. One of the county principals, Ross Rumbaugh, suggested someone else "speak . . . for the school." The parents at the meeting asked Wood to act as a spokesman and talk with Stellar. After coordinating with other parents and the parent teacher organization, Wood, other parents, Rumbaugh, and Stellar met. Stellar "in a whirlwind[,]" told others he would have to close the schools because of a "huge" budget deficit.

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3. Plaintiffs filed a written version of their objection on 2 June 2016.

4. The court originally called the case for trial on or about 8 June 2016. However, on 29 June 2016, the court declared a mistrial.

On 28 March 2011, the Board held a meeting to vote on closing the schools in Burke County. Twelve to fifteen hundred people attended. Wood presented, began to comment about a county employee (Morgan), and read a letter from a school employee, in which the school employee called Stellar a "bully." The Board chairperson, Catherine Thomas, "cut [him] off[.]" Thomas told Wood any personnel issues must be discussed in a closed session.

At the end of the open session, the Board went into closed session. Wood told the Board he presented on behalf of himself and Carlton. Wood wanted to bring forward "sensitive issues" and "needed to know that they could be kept confidential." Thomas responded, "[T]hat's fine[,]" and the other Board members remained silent. Wood started his statement about "the manager of strategic alliance position[,]" but the Board cut him off.[5]

After the closed session ended, Wood and Thomas spoke. Wood told Thomas both he and Carlton had more information about Stellar and Morgan and asked if he needed to attend another closed Board session. Thomas instructed Wood to "submit it to the board confidentially in writing . . . so that they can take a look at it."

The next day, Plaintiffs met and started drafting a letter. On 11 April 2011, prior to another Board meeting, Plaintiffs again met and assembled envelopes for each Board member and the Board attorney, Chris Campbell. On the outside of each envelope, Carlton wrote "Confidential." The envelope included a letter, which stated:

> Please find attached documentation of several issues we wish to bring before the Burke County School Board detailing disturbing allegations regarding Dr[.] Arthur Stellar and others within our school system. As concerned business owners, parents and stakeholders in Burke County we wish to respectfully request further investigation into these issues to ensure the optimal operation of our schools and more importantly the welfare of our children and this county.
>
> We are not lawyers or educators. Although we cannot personally attest to the veracity of the claims herein and make no representation any or all of the claims are factual or presented in their entirety, we do ask for a complete

5. Wood did not testify about which Board member interrupted his statement.

> and thorough investigation. We trust you to ascertain the facts as our elected officials[.]
>
> We chose to represent these items for individuals within the school system and our county who say they are simply too afraid to speak on their own behalf. These people need their jobs, especially in such tough economic times. However they do not need to perform their jobs under such stressful and hostile conditions. For this reason please consider the source of all items herein to be anonymous or strictly confidential.
>
> We wish to apologize for the obvious lack of complete supporting documentation in some of the areas we present. This is intentional because we fear destruction of pertinent evidence if requested through normal channels. We have already been informed of such incidents with key documents related to the claims herein.
>
> We will gladly cooperate with the board in any way possible that does not endanger jobs or personal assets. We request these communications remain confidential to protect the reputations of anyone innocently accused. We fully trust that the appropriate action can and will be taken without the necessity of the Stakeholders of Burke County having to seek legal counsel[.]

(Emphasis omitted).

At the 11 April 2011 Board meeting, which Wood did not attend, Carlton handed out the envelopes. Without Thomas's promise of confidentiality, Wood would not have compiled or submitted the information.

In November 2011, Morgan sued Plaintiffs for defamation of character. Prior to the suit, Wood did not know the Board broke the confidentiality of the letter. Three newspapers, a radio station, and a local blogger covered the lawsuit. The media coverage was "embarrassing" and "humiliating" and "destroyed [his] reputation." Clients stopped using his photography business because "[n]obody wants to be associated with, with that."

Plaintiffs called Donald Vaughan and tendered him as an expert in the field of state and local government administration and leadership. Vaughan reviewed Plaintiffs' complaint, Defendant's answer, affidavits, and depositions. Vaughan also reviewed the applicable statutes. Vaughan explained the difference between open and closed Board sessions,

specifically stating "the information that is brought into that [closed] session is expected to be closed." He opined "a citizen ought to be able to rely on the promise of a chairman of the board."[6]

Plaintiff Carlton testified on his own behalf. Carlton lived in Burke County and owned Express Lube and Wash, a car maintenance business. Carlton had one son, who attended school in Burke County. In 2011, Carlton attended several Board meetings. Stellar, the superintendent at the time, discussed closing schools in Burke County, claiming the Board suffered from a deficit. However, in June 2011, financial records showed the county actually had a ten to twelve million dollar surplus.

On 28 March 2011, Carlton could not attend a Board meeting, but Wood spoke on his behalf. After the meeting, Plaintiffs compiled an envelope to give to the Board about issues with Stellar. Carlton thought the information needed to be confidential for two reasons—to protect the people mentioned and to protect Plaintiffs from retaliation. Carlton attended the Board meeting on 11 April 2011. Before the meeting began, pursuant to Board procedures, Carlton gave eight envelopes to the Board's secretary for distribution to Board members.

On 18 August 2011, the Board bought out Stellar's contract, releasing him prior to the end of his contract. The next morning, Morgan resigned. Carlton first learned of the breach of confidentiality and Morgan's lawsuit through rumors online. After reading about the suit on a local blogger's website, a deputy served Carlton with the complaint at his business, in front of customers. Three newspapers, a radio station, and a local blogger covered the lawsuit. As a result of the suit and coverage, Carlton resigned from his deaconship at his church. Longstanding customers stopped coming to Carlton's business. Consequently, Carlton closed the car wash portion of his business.

Plaintiff called Catherine Thomas, a former member and Chair of the Board. In fall 2010, the Board hired an outside attorney, Chris Campbell, to investigate complaints about Stellar. In a closed session on 22 November 2010, Campbell reported his findings to the Board and the Board's attorney. After his report, the Board gave "[t]hose documents" back to Campbell, to store at his office, so they did not become public.

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6. Defendant objected and moved to strike this portion of Vaughan's testimony. The court had Plaintiffs' counsel reword the question and instructed Vaughan to answer "that limited question." Vaughan answered, "Should be able to rely on it."

On 28 March 2011, the Board held an open session. Wood spoke at the session, first about schools closing and then about Stellar and Morgan. Thomas interrupted Wood and told him, "You can't discuss personnel matters in, in public like that." Thomas told Wood he could finish his speech during a closed session. When Wood later attended a closed session, "he complained about Dr. Stellar . . . [and] probably talked about Amy Morgan as well[,]" though Thomas did not recall "specifically" what Wood said. The closed session ended before Wood could finish his speech. Thomas instructed Wood to "put it in writing and submit it confidentially." It was Thomas's "intention" to tell Wood to "submit it so that it could be reviewed in closed session[.]"[7] At that time, Thomas did not expect that the information Wood gave would be turned over to Stellar.

At the next Board meeting, on 11 April 2011, each Board member's seat had an envelope marked "Confidential." Inside the envelope, Board members found a cover letter and other documents "that detailed allegations about Dr. Stellar and Ms. . . . Amy [Morgan.]" During a following closed session, Thomas read the materials. When other members asked what to do with the envelope, Thomas replied, "It's confidential and we'll discuss it later." Additionally, "[t]he school board knew that personnel matters were confidential and had been trained on that many times." Thomas gave her envelope to attorney Campbell. Other members of the Board took the envelope and documents home.

Sometime after the meeting, Thomas asked Campbell to investigate the allegations in the report. On 25 April 2011, Campbell reported his findings in a closed session, without Stellar present. The Board did not take any action on the allegations at that meeting.

In August 2011, the Board decided to buy out Stellar's contract. The next day, Morgan resigned from her position. Thomas did not "think" the Board took any adverse action against Morgan. Thomas voted in favor of buying out Stellar's contract, in part based on the allegations in the envelope Plaintiffs submitted. On 31 October 2011, Thomas learned the documents became public because of a local blog. However, she did not give the documents to anyone besides Campbell.

Plaintiff next called Susan Stroup, a former Board member. At the March 2011 closed session, Wood, amongst others, lodged complaints against Stellar. When asked about the complaints she heard from others and if Wood specifically mentioned an inappropriate relationship

7. This wording is from Plaintiffs' counsel's question, to which Thomas responded in the affirmative.

between Stellar and Morgan, Stroup answered, "I don't remember that specifically. I just --. I just know that it was directed towards Dr. Stellar's -- lots of things about him, just various issues about him. Inappropriate relationships, as well as, other things, but I, I don't remember exactly what it was."

At the 11 April 2011 meeting, Stroup found an envelope marked "Confidential" in her seat. She was not surprised to see an envelope in her seat, because Stellar often left packets out for Board members. Stroup "glanc[ed]" at the documents, which did not contain any information she did not already know. The information "was pretty common knowledge[.]" Stroup took the documents home with her. However, another Board member, Rob Hairfield, left his envelope on the desk. Hairfield, due to health difficulties, often left things on his desk, and Stellar's secretary "usual[ly]" got what Hairfield left. Stroup could not specifically remember if the secretary picked up Hairfield's envelope at the April 2011 meeting. The Board never voted to keep the documents away from Stellar and Morgan. After her last Board meeting, Stroup gave the envelope and documents to "the central office to the superintendent's secretary."

Plaintiffs rested.[8] Defendant moved for directed verdict. The trial court denied the motion for directed verdict.

Defendant called Robert Armour, a current member of the Board. At the 11 April 2011 meeting, Armour saw an envelope in his chair. Armour did "nothing" with the materials at the meeting and took the envelope home. At home, he opened the envelope and read documents "that implied . . . that referred to rumors and conjecture" he already heard about Stellar and Morgan. Armour did not give the documents to another.

Armour also described Board practice during closed sessions. When in closed session, the Board members "are trained . . . to keep whatever goes on in closed session meeting quiet." "Quiet" means "[n]ot to discuss it with anyone else outside the meeting." However, at the meeting, the Board did not explicitly vote to keep the information Plaintiffs gave confidential.

Defendant called Karen Sain, another former Board member. Sain attended the 11 April 2011 Board meeting and received the envelope from Plaintiffs. She opened the envelope at the meeting, but did not review it there. Sain took the envelope and documents home and burned

8. Plaintiffs also called five other witnesses, but their testimonies are not pertinent to the issues on appeal.

them. The Board did not vote to keep the documents confidential or from Stellar. Sain also described how the Board acts in closed sessions. Specifically, Sain testified the chairperson cannot make a decision on her own, as the Board "perform[s] as a body."

Defendant called Samuel Wilkinson, a member of the Board. Wilkinson attended the 11 April 2011 meeting. However, Wilkinson did not "specifically remember receiving" the envelope and documents, though he was "sure that packet was delivered." He also did not remember receiving anything from Plaintiffs. He did not give any materials received as a member of the Board to Stellar or Morgan.

Defendant called Timothy Buff, another former Board member. Buff attended the 11 April 2011 meeting, where there was an envelope in his seat. Buff did not review the materials at the meeting and took the envelope home. At the meeting, Thomas did not say the information in the envelope must remain confidential, and the Board did not vote to keep the information confidential. Buff did not give the envelope to anyone.

Defendant called Chris Campbell. Campbell did not work "in-house" as the Board's attorney, but as "an independent attorney hired for legal matters." In 2010, the Board hired Campbell to investigate Stellar. In April 2011, Campbell received one of the envelopes distributed to Board members. In August 2011, Stellar asked Campbell for copies of complaints "made against him in the process of the review[.]" Campbell did not consult with the Board and sent Stellar the cover letter and other documents which were in the envelopes Plaintiffs compiled. Campbell considered the complaint to be a part of Stellar's personnel file.

Defendant rested and renewed its motion for directed verdict. The court denied the motion.[9] The jury found Defendant liable for invasion of privacy and negligent infliction of emotional distress as to both Plaintiffs. The jury awarded Plaintiffs $250,000 each. On 12 October 2016, the trial court entered judgment in accordance with the jury verdicts.

On 24 October 2016, Defendant filed a motion for judgment notwithstanding the verdict and a motion for new trial, pursuant to Rule 59(a)(1), (7)-(9). On 16 November 2016, Plaintiffs filed a motion for recovery of litigation costs and expenses. On 22 November 2016, the court held a hearing on the parties' motions. After argument, the court denied Defendant's motions. The court awarded Plaintiffs $4,281.85 in costs and expenses.

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9. Plaintiffs moved for directed verdict on Defendant's defense of contributory negligence. The court granted Plaintiffs' motion.

The same day, the court entered orders in accordance with its oral rulings. On 20 December 2016, Defendant filed notice of appeal.

## II. Jurisdiction

Our Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(1) (2017).

## III. Standard of Review

We apply several standards of review to examine Defendant's appeal.

First, we review a trial court's determination on sovereign immunity *de novo*.[10] *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013) (citations omitted) ("[A]lthough not explicitly stated previously, it is apparent that we have employed a de novo standard of review in other cases involving sovereign immunity.").

Second, the standard of review for a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). We use the same standard of review for the denial of a motion for directed verdict and the denial of a motion for judgment notwithstanding the verdict. *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted). The standard is "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

*Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (citation omitted).

10. We note whether sovereign immunity is a challenge to personal jurisdiction or subject matter jurisdiction is unsettled in North Carolina law. *See M. Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012) (citations omitted) ("A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.").

There must be more than a "scintilla of evidence supporting each element of the non-movant's claim." *Denson v. Richmond Cty.*, 159 N.C. App. 408, 412, 583 S.E.2d 318, 320 (2003) (quotation marks and citation omitted). "A scintilla is some evidence, and is defined by this Court 'as very slight evidence.' " *Mace v. Pyatt*, 203 N.C. App. 245, 251, 691 S.E.2d 81, 87 (2010) (some quotation marks and citation omitted). "If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [judgment notwithstanding the verdict] should be denied." *Green v. Freeman*, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (quotation marks, citation, and alteration omitted). We review the trial court's denial *de novo*. *Denson*, 159 N.C. App. at 411, 583 S.E.2d at 320 (citation omitted).

Third, "an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations omitted). "Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605. However, if the motion for a new trial is based on an error in law occurring at the trial and objected to by the party making the motion, our Court reviews *de novo*. *Greene v. Royster*, 187 N.C. App. 71, 78, 652 S.E.2d 277, 282 (2007) (citations omitted).

## IV. Analysis

Defendant contends the trial court erred in the following ways: (1) denying its motion to dismiss based on immunity; (2) denying its motion to dismiss for failure to state a claim, motion for directed verdict, and motion for judgment notwithstanding the verdict; (3) denying its motion for new trial; and (4) awarding Plaintiffs costs and expenses.

### A. Motion to Dismiss Based on Sovereign Immunity

**[1]** Defendant first contends the court erred by denying its motion to dismiss based on immunity. In its brief, Defendant asserts sovereign immunity barred both the invasion of privacy and negligent infliction of emotional distress claims. At oral argument, however, Defendant conceded it failed to argue below sovereign immunity barred Plaintiffs' claim for negligent infliction of emotional distress. Thus, Defendant's argument as to the negligence claim is not properly before this Court, and we do not address it. For reasons stated *infra*, we need not address

whether Defendant's argument that sovereign immunity barred Plaintiffs' invasion of privacy claim would have been meritorious.

**B. Motion to Dismiss Based on Failure to State a Claim, Motion for Directed Verdict, and Motion for Judgment Notwithstanding the Verdict**

**[2]** Defendant next contends the trial court erred by denying its motions to dismiss pursuant to Rule 12(b)(6), for directed verdict, and for judgment notwithstanding the verdict. Defendant argues Plaintiffs failed to present sufficient evidence of duty, breach of duty, and reasonable foreseeability in support of their claim for negligent infliction of emotional distress.

First, Defendant argues it did not, and could not, owe Plaintiffs any duty for three reasons: (1) the documents submitted (and information contained therein) were public information; (2) the closed nature of the Board session did not mean the matters were confidential; and (3) Thomas's assertions of confidentiality did not bind the Board because she acted alone. Plaintiffs contend a duty arose from the circumstances.

Vaughan, Plaintiffs' expert on state and local government and administration and leadership, testified:

> BY [PLAINTIFFS' COUNSEL]:
>
> Q. Well, let me just ask you, in terms of the closed session in this case, could you explain what we're talking about and how that impacts –
>
> A. Sure.
>
> Q. -- the issues in this case?
>
> A. In a closed session, information is presented to a body without the public being in. The public could be in this particular meeting. They could, could fill the whole courthouse if they were interested enough in this particular case. A closed session is the participants in the closed meeting of, of the board. In this case they had requested that their information be held confidential.
>
> [DEFENDANT'S COUNSEL]: Objection. Move to strike.
>
> THE COURT: Sustained. Motion to strike is allowed as to the "keep it confidential." Next question, please.

BY [PLAINTIFFS' COUNSEL]:

Q. Let me ask you, in this case is it typical when a, a school board or any public entity wants to go into closed session, they have to make a motion to go into closed session and that has to be voted on by the school board?

A. That's correct. The statutes are pretty specific. Closed sessions are a rare animal. Ninety -- I would guess 90 percent of, of all -- 95 percent of all sessions of every board, board meeting in North Carolina this week would be in open session. There are just particular things that allow a board to go into closed session.

Q. Okay. And in this case the board went into closed session --

A. That's correct.

Q. -- correct? And then once the board went into closed session, tell the jury about the importance of citizens being able to share information with a school board or city council or county commissioners in closed session.

A. It's --

Q. What, what does that mean?

A. It's the reason -- It's the whole basis of democracy. You have elected the people on a school board to represent you and your best interest on school-board-type related matters. They are the people's representative, and they make the decisions based on the information that they have.

And it's the right of citizens, it's the basic tenant of government in North Carolina, that, that citizens can go before those boards and express their concerns, grievances, whatever they want to express. That's, that's why we have government and not monarchs and dictators and other things. That's why we have the government the way we have it in North Carolina.

Q. Okay. And once the citizens go before a governmental entity like a school board in closed session and whatever statements they make or discussions there are in that closed session, is that information that they say or people

question, promises made -- is that information that would be open or public or would that information be --

A. "Closed" means closed.

[DEFENDANT'S COUNSEL]: Objection, Your Honor. Move to strike.

THE COURT: Overruled.

BY [PLAINTIFFS' COUNSEL]:

Q. Go, go ahead and explain your answer.

A. Closed sessions are closed sessions. They are not open to the public. And the information that is brought into that session is expected to be closed.

Q. Now, let me ask you this: Assuming that the evidence in this case will tend to show by its greater weight that during the first closed session in which Mr. Wood made a presentation to the Burke County Board of Education in their closed session and made a statement that he wanted whatever information he shared or gave to the school board to be kept in confidence, do you have an opinion satisfactory to yourself as to whether or not during the course of that actual session that if the chairperson of the school board told him that the information would be kept confidential that he could rely on her promise?

[DEFENDANT'S COUNSEL]: Objection, Your Honor.

THE COURT: Sustained as to the form.

[PLAINTIFFS' COUNSEL]: Okay.

BY [PLAINTIFFS' COUNSEL]:

Q. State whether or not in a closed session that citizens can rely on a promise of confidentiality by the chair of, of a school.

[DEFENDANT'S COUNSEL]: Objection, Your Honor.

THE COURT: Sustained as to the form.

BY [PLAINTIFFS' COUNSEL]:

Q. Just explain to us the significance of a -- the closed session as it relates to whatever is promised or said in a closed session by the chairman of the governmental --

> A. I think a citizen ought to be able to rely on the promise of the chairman of a board.
>
> [DEFENDANT'S COUNSEL]: Objection. Move to strike. Your Honor, may we approach?
>
> THE COURT: Yes. Wait one second. The response is nonresponsive to the question. Restate your question. Listen to the question. Answer the question. The question again, please.
>
> BY [PLAINTIFFS' COUNSEL]:
>
> Q. Well, the question is: Explain to the jury how the closed session relates to any statements made in closed session by the citizens going before the, the governmental body or any statements made by the chairman of, of a school board or any promises made by the chairman of the school board. How, how do those two things fit together?
>
> [DEFENDANT'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled as to that. You may answer to that limited question. Answer, please.
>
> BY [PLAINTIFFS' COUNSEL]:
>
> A. Should be able to rely on it. That's the whole basis--

Additionally, Thomas instructed Wood to submit the information confidentially. Plaintiffs both testified about how the promise of confidentiality influenced their decision to submit the letter and supporting documents. Plaintiffs marked "Confidential" on the front of each envelope and asked for confidentiality in the letter. Wood testified he began his speech during the closed session by saying he wanted to bring forward "sensitive issues" and "needed to know that they could be kept confidential." Former Board member, Robert Armour, testified when in closed session, Board members "are trained . . . to keep whatever goes on in closed session meeting quiet." "Quiet" means "[n]ot to discuss it with anyone else outside the meeting." After reviewing the evidence in the light most favorable to the non-movant Plaintiffs, we conclude Plaintiffs produced sufficient evidence of Defendant's duty owed.[11]

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11. Defendant also contends the Public Records Act required it to provide Stellar and Morgan with their personnel files, which included Plaintiffs' identities. N.C. Gen. Stat. § 115C-319 defines a personnel file as:

> Personnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment

**[3]** Second, Defendant argues Plaintiffs failed to present more than a scintilla of evidence Defendant breached any duty. Specifically, Defendant contends Plaintiffs only presented evidence showing attorney Campbell, who did not work as the Board's attorney at the time, gave Stellar Plaintiffs' identities. Defendant further argues that at trial, Plaintiffs proceeded under a "fail[ure] to secure" theory of negligence—that Defendant failed to properly secure the confidential information. However, viewing the evidence in the light most favorable to Plaintiffs and resolving all contradictions in Plaintiffs' favor, we conclude Plaintiffs presented sufficient evidence—more than mere speculation—Defendant breach its duty to keep Plaintiffs' identities confidential.

**[4]** Finally, Defendant argues Plaintiffs failed to present sufficient evidence of the reasonable foreseeability they would suffer severe emotional distress. Defendant points to evidence Wood attempted to openly discuss Stellar's and Morgan's alleged behavior and relationship at the 28 March 2011 Board meeting. Our review of the evidence, in the light most favorable to Plaintiffs, reveals sufficient evidence of reasonable foreseeability. Plaintiffs explicitly marked "Confidential" on each envelope and stated several times in the letter their request for confidentiality. Wood testified when he attended the Board's closed session, he told the Board he needed to discuss "sensitive issues" and "needed to know

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> with local boards of education shall not be subject to inspection and examination as authorized by G.S. 132-6. For purposes of this Article, a personnel file consists of any information gathered by the local board of education which employs an individual, previously employed an individual, or considered an individual's application for employment, and which information relates to the individual's application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment wherever located or in whatever form.

N.C. Gen. Stat. § 115C-319 (2017).

Defendant argues because Plaintiffs asked the Board to terminate or put Stellar and Morgan on leave, the letter (and Plaintiffs' identities) were a part of Stellar's and Morgan's personnel files. In a footnote, Defendant argues the information was not confidential because Stellar has a "right to judicial review of the reasons and validity of his removal." Plaintiffs argue "[t]he information submitted by Plaintiffs does not relate to any promotion, demotion, [or] termination . . . ." Plaintiffs argue the Board bought out Stellar's contract—did not demote or terminate him—and Morgan resigned. While Defendant is correct Stellar would have a right to his personnel file, Plaintiffs made clear in their letter and at the trial court the confidential information was not just the allegations within the letter, but also Plaintiffs' identities as the source of the information. Indeed, the cover letter explicitly stated, "please consider the source of all items herein to be anonymous or strictly confidential." Thus, the Board could inform Stellar of the reasons for the buyout, without disclosing Plaintiffs' confidential information—their identities.

that they could be kept confidential." Chairperson Thomas replied, "[T]hat's fine[.]" Wood also testified without Thomas's promise of confidentiality, he would not have submitted the letter. Thus, we conclude Plaintiffs presented sufficient evidence of reasonable foreseeability of emotional distress.

Accordingly, the trial court did not err by denying Defendant's motion to dismiss, motion for direct verdict, or motion for judgment notwithstanding the verdict for Plaintiffs' negligent infliction of emotional distress claim.[12] Below, the jury awarded both Plaintiffs $250,000 for both negligent infliction of emotional distress and invasion of privacy. The verdict sheets show the jury awarded the full amount for both claims to both Plaintiffs and did not divide the amount between the two claims. Thus, we need not analyze Defendant's motions as to the invasion of privacy claim, for the judgment still stands, as we affirm the trial court's denial of Defendant's motions as to the negligence claim.

### C. Motion for New Trial

Defendant next argues the trial court erred by denying its motion for new trial because the court "allowed inadmissible and highly prejudicial testimony and instructed the jury on an unsupported theory of negligence." (All capitalized in original). Defendant's argument is threefold and concerns: (1) testimony on lost future profits; (2) instructing the jury on failure to secure information; and (3) "[p]rejudicial and [i]rrelevant" testimony.

*i. Carlton's Testimony on Lost Profits*

**[5]** Defendant and Plaintiffs disagree as to whether Defendant preserved this argument as a ground for its motion for new trial and on appeal. Defendant asserts it preserved the issue on appeal because it filed and argued a motion *in limine* and objected during Carlton's testimony. However, as argued at the trial court, Defendant did not base its motion *in limine* on the same grounds now argued on appeal. Below, Defendant argued Carlton was not an expert and did not give Defendant his 2015 tax return. During Carlton's testimony, Defendant did object several times, but, again, not on the grounds argued on appeal. N.C. R. App. P. 10(a)(1) (2017) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired the court to make[.]"). Defendant contended some numbers were based on

12. We conclude the allegations in Plaintiffs' complaint, taken as true, were sufficient to withstand Defendant's motion to dismiss for failure to state a claim.

speculation, Carlton was not an expert, and Plaintiffs' counsel impermissibly asked leading questions. Defendant did not object to Carlton's testimony (or to jury instructions) that "lost business profits are not a proper measure of damage in this type of tort case." Accordingly, Defendant did not present this argument below, and it not properly before us on appeal.

*ii. Theory of Negligence Outside the Pleadings*

**[6]** Defendant next argues the trial court erred in instructing the jury on failure to secure the information when Plaintiffs did not include this theory of negligence in their pleadings. Defendant further contends this theory "was directly contrary to the only basis alleged for their claim – that a Board member actively gave the information to Stellar." At the outset, Plaintiffs pled multiple theories, two of which were an intentional act by the Board and negligence by the Board. In their complaint, Plaintiffs did not limit their allegation of a negligent act to a specific act. Plaintiffs' complaint alleges "Defendants committed a negligent act[.]" Thus, the negligent act Plaintiffs forwarded at trial (failure to secure information) was within the pleadings, as the pleadings were not limited.[13]

*iii. Prejudicial and Irrelevant Testimony*

**[7]** Defendant contends "[t]he trial court continually allowed highly inflammatory and irrelevant testimony about Stellar which had nothing to do with the legal issues and which, taken together, painted a negative picture of the management of the school system which easily could have colored the jury's view of the Board." Defendant specifically points to five portions of testimony. However, Defendant did not include three of the five portions in its motion for new trial (points one, three, and five). As for the two portions of testimony properly before this Court, we reviewed the record below and conclude neither warrants a new trial. Accordingly, we affirm the trial court's order denying Defendant's motion for new trial.

**D. Costs and Expenses**

**[8]** Lastly, Defendant contends "[a]s the Board was entitled to dismissal, and/or directed verdict and/or JNOV and/or new trial, plaintiffs were not entitled to costs and expenses." As stated above, we hold the

13. Defendant is correct in its assertion Plaintiffs pled "That upon information and belief, around the early part of August, 2011 when Dr. Stellar was still Superintendent of the Board, he leaked a copy of the confidential packet to Amy Morgan." However, Plaintiffs also asserted a broad claim of negligence in their complaint.

trial court properly denied Defendant's motions for dismissal, directed verdict, judgment notwithstanding the verdict, and new trial. Thus, the trial court did not err in awarding Plaintiffs costs and expenses.

## V. Conclusion

For the foregoing reasons, we affirm the trial court's orders and judgment.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

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CARLOS CHAVEZ, PETITIONER
v.
IRWIN CARMICHAEL, SHERIFF, MECKLENBURG COUNTY, RESPONDENT

LUIS LOPEZ, PETITIONER
v.
IRWIN CARMICHAEL, SHERIFF, MECKLENBURG COUNTY, RESPONDENT

No. COA18-317

Filed 6 November 2018

**1. Appeal and Error—mootness—prisoners released to Immigration and Customs Enforcement—public interest exception**

In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency, the appeal was not moot even though the defendants were no longer in the sheriff's custody after being turned over to ICE. The appeal fell within the public interest exception because of the need to resolve whether state courts possess jurisdiction to review habeas corpus petitions of suspected alien detainees held under the authority of the federal government, a determination that would impact habeas petitions filed by other detainees.

**2. Appeal and Error—judicial notice—materials not submitted to lower court—relevant to subject matter jurisdiction**

In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency,

the 287(g) agreement signed between the Mecklenburg County Sheriff and ICE was properly included in the record on appeal despite not being submitted to the trial court, because appellate courts may consider important public documents that were not before the lower tribunal to determine the existence of subject matter jurisdiction.

**3. Habeas Corpus—jurisdiction—subject matter—state habeas corpus petition—federal immigration law**

In a matter involving habeas corpus petitions filed by two criminal defendants seeking relief from detention by a county sheriff acting under a 287(g) agreement with the federal Immigration and Customs Enforcement (ICE) agency, the Court of Appeals rejected petitioners' argument that N.C.G.S. § 162-62 prevented the sheriff from detaining them on behalf of ICE. Section 128-1.1, a more specific statute and therefore controlling, expressly authorizes state and local law enforcement officers to enter into formal cooperative agreements and perform the functions of immigration officers, including detention of suspected aliens.

**4. Habeas Corpus—jurisdiction—subject matter—federal immigration detainer—exclusive jurisdiction of federal government**

The trial court lacked subject matter jurisdiction to review two petitioners' habeas corpus petitions seeking relief from a federal immigration hold, and was therefore without authority to order a county sheriff to release petitioners from custody, because immigration matters are within the exclusive jurisdiction of the federal government.

**5. Jurisdiction—state court—federal immigration detainer—exclusive jurisdiction of federal government**

State courts may not infringe on the federal government's exclusive jurisdiction over immigration matters, even in the absence of a formal cooperative agreement between a state or local authority and the federal Immigration and Customs Enforcement agency, since federal law authorizes such cooperation with or without a formal agreement.

**6. Habeas Corpus—petition in state court—federal immigration detainer—infringement on federal authority**

The trial court lacked jurisdiction to issue habeas relief to two petitioners seeking release from a federal immigration detainer enforced by a county sheriff, because state courts have no jurisdiction to review habeas petitions, other than to dismiss for lack

of jurisdiction, nor do they have authority to issue writs of habeas corpus or intervene in any way with detainees being held under the authority of the federal government. State and local law enforcement officers acting pursuant to formal cooperative agreements with the Department of Homeland Security or Immigration and Customs Enforcement are de facto federal officers performing immigration functions, including detention and turnover of physical custody.

Judge DIETZ concurring with separate opinion.

Appeal by respondent from orders entered 13 October 2017 by Judge Yvonne Mims-Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2017.

*National Immigration Project of the National Lawyers Guild, by Sejal Zota, and Goodman Carr, PLLC, by Rob Heroy, for petitioners Luis Lopez and Carlos Chavez.*

*Womble Bond Dickenson (US) LLP, by Sean F. Perrin, for respondent.*

*U.S. Department of Justice Civil Division, by Trial Attorney Joshua S. Press, for amicus curiae United States Department of Justice.*

TYSON, Judge.

Mecklenburg County Sheriff Irwin Carmichael ("the Sheriff") appeals, in his official capacity, from two orders of the superior court ordering the Sheriff to release two individuals from his custody. We vacate the superior court's orders and remand to the superior court to dismiss the *habeas corpus* petitions for lack of subject matter jurisdiction.

## I. Background

### A. *287(g) Agreement and ICE Detainer Requests*

The Sheriff and Immigration and Customs Enforcement ("ICE"), an agency under the jurisdiction and authority of the United States Department of Homeland Security ("DHS"), entered into a written agreement (the "287(g) Agreement") on 28 February 2017 pursuant to 8 U.S.C. § 1357(g)(1).

The federal Immigration and Nationality Act ("INA") authorizes DHS to enter into formal cooperative agreements, like the 287(g)

Agreement, with state and local law enforcement agencies and officials. *See* 8 U.S.C. § 1357(g). Under these agreements, state and local authorities and their officers are subject to the supervision of the Secretary of Homeland Security and are authorized to perform specific immigration enforcement functions, including, in part, investigating, apprehending, and detaining illegal aliens. 8 U.S.C. §§ 1357(g)(1)-(9). In the absence of a formal cooperative agreement, the United States Code additionally provides local authorities may still "communicate with [ICE] regarding the immigration status of any individual . . . or otherwise cooperate with [ICE] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(A)-(B).

Upon request from DHS, state and local law enforcement may "participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.* However, state and local officers may not make unilateral decisions concerning immigration enforcement under the INA. *Id.*

Federal agencies and officers issue a Form I-247 detainer regarding an alien to request the cooperation and assistance of state and local authorities. 8 C.F.R. § 287.7(a), (d). An immigration detainer notifies a state or locality that ICE intends to take custody of an alien when the alien is released from that jurisdiction's custody. *Id.* ICE requests the state or local authority's cooperate by notifying ICE of the alien's release date and by holding the alien for up to 48 hours thereafter for ICE to take custody. *Id.* In addition to detainers, ICE officers may also issue administrative warrants based upon ICE's determination that probable cause exists to remove the alien from the United States. *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (citing *Abel v. United States*, 362 U.S. 217, 233-34, 4 L. Ed. 2d 668 (1960) and 8 U.S.C. § 1226(a)).

### B. *Chavez and Lopez' Habeas Petitions*

#### 1. Luiz Lopez

On 5 June 2017, Luiz Lopez ("Lopez") was arrested for common law robbery, felony conspiracy, resisting a public officer, and misdemeanor breaking and entering. Lopez was incarcerated at the Mecklenburg County Jail under the Sheriff's custody. Later that day, following his arrest, Lopez was served with a Form I-200 administrative immigration arrest warrant issued by DHS. Also the same day, the Sheriff's office was served with a Form I-247A immigration detainer issued by DHS. The Form I-247A requested the Sheriff to maintain custody of Lopez for up

48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of Lopez. Lopez was held in jail on the state charges under a $400 secured bond.

2. Carlos Chavez

On 13 August 2017, Carlos Chavez ("Chavez") was arrested for driving while impaired, no operator's license, interfering with emergency communications, and assault on a female, and was detained at the Mecklenburg County Jail. That same day, Chavez, under his name "Carlos Perez-Mendez," was served with a Form I-200 administrative immigration warrant issued by DHS.

The Sheriff's office was served with a Form I-247A immigration detainer, issued by DHS, requesting the Sheriff to detain "Carlos Perez-Mendez" for up to 48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of him. Chavez was held in jail for the state charges on a $100 cash bond.

At approximately 9:00 a.m., on 13 October 2017, Lopez' release from jail on state criminal matters was resolved when his $400 secured bond was purportedly made unsecured by a bond modification form. That same day, Chavez posted bond on his state criminal charges. The Sheriff continued to detain Lopez and Chavez ("Petitioners") at the county jail pursuant to the Form I-247A immigration detainers and I-200 arrest warrants issued by DHS.

At 9:13 a.m. on 13 October 2017, Chavez and Lopez filed petitions for writs of *habeas corpus* in the Mecklenburg County Superior Court. Petitioners recited three identical grounds to assert their continued detention was unlawful: (1) "the detainer lacks probable cause, is not a warrant, and has not been reviewed by a judicial official therefore violating [Petitioners'] Fourth Amendment rights under the United States Constitution and . . . North Carolina Constitution"; (2) "[the Sheriff] lacks authority under North Carolina General Statutes to continue to detain [Petitioners] after all warrants and sentences have been served"; and (3) "[the Sheriff's] honoring of ICE's request for detention violates the anti-commandeering principles of the Tenth Amendment . . . ." In his petition for writ of *habeas corpus*, Chavez alleged that he was held at the county jail pursuant to the immigration detainer and administrative warrant listing his name as "Carlos Perez-Mendez."

Later that morning, the superior court granted both Petitioners' petitions for writs of *habeas corpus*, and entered return orders, which ordered that the Petitioners "be immediately brought before a judge of Superior Court for a return hearing pursuant to N.C.G.S. 17-32 to

determine the legality of [their] confinement." The trial court also ordered the Sheriff to "immediately appear and file [returns] in writing pursuant to N.C.G.S. 17-14."

Based upon our review of a chain of emails included in the record on appeal, Mecklenburg County Public Defender's Office Investigator, Joe Carter, notified Marilyn Porter, in-house legal counsel for the Sheriff's office, the petitions for writs of *habeas corpus* had been filed. At 9:30 a.m. on October 13, Porter forwarded Carter's email to the Sheriff; Sean Perrin, outside legal counsel for the Sheriff; and eight other individuals affiliated with the Sheriff's office. Porter stated in her email that "I do not acknowledge receipt of any of [Carter's] emails on this topic. We will see who is the subject of this Writ – and what Judge signed."

In the same chain of emails, Sheriff's Captain Donald Belk responded he had received notice from the clerk of court that Petitioners' "cases are on in 5350 this morning." Belk also wrote, "CHAVEZ, CARLOS 451450, he was put in ICE custody this morning. I have informed Lock Up that Chavez is in ICE custody and should not go to court." Belk's email also stated, "LOPEZ, LUIS 346623, he is in STATE custody."

After the superior court signed its return orders, Public Defender Investigator Carter went to the Sheriff's office. An employee at the front desk informed him that neither the Sheriff nor his in-house counsel, Porter, were present at the office. The front desk receptionist refused to accept service of the superior court's return orders and the Petitioners' *habeas* petitions. Carter left copies of the orders and petitions on the Sheriff's front desk at 10:23 a.m. Carter then went to the county jail and left copies of the orders and petitions with a sheriff's deputy at 10:26 a.m.

At 11:57 a.m. that morning and without notice of the hearing to the Sheriff, the superior court began a purported return hearing on Petitioners' *habeas* petitions. The Sheriff did not appear at the hearing, did not produce Petitioners before the court, and had not yet filed returns pursuant to N.C. Gen. Stat. § 17-14 (2017).

During the return hearing, Petitioners' counsel provided the court with Carter's certificates of service of the Petitioners' *habeas* petitions and the court's return orders. Petitioners' counsel informed the court about the email sent by Carter to the Sheriff's in-house counsel, Porter, earlier that day. The court ruled Petitioners' continued detention was unlawful and ordered the Sheriff to immediately release Petitioners.

Later that day, after the superior court had ordered Petitioners to be released, counsel for the Sheriff timely filed written returns for both Petitioners' cases within the limits allowed by N.C. Gen. Stat. § 17-26

(2017). Before the superior court issued its orders to release Petitioners, the Sheriff's office had turned physical custody of both Petitioners over to ICE officers.

On 6 November 2017, the Sheriff filed petitions for writs of certiorari with this Court to seek review of the superior court's 13 October 2017 orders. The Sheriff also filed petitions for a writ of prohibition to prevent the superior court from ruling on *habeas corpus* petitions filed in state court, premised upon the Sheriff's alleged lack of authority to detain alien inmates subject to federal immigration warrants and detainer requests. On 22 December 2017, this Court allowed the Sheriff's petitions for writs of certiorari and writ of prohibition.

On 22 January 2018, the Sheriff served a proposed record on appeal. Petitioners objected to inclusion of two documents, a version of the Form I-200 immigration arrest warrant for Lopez signed by a DHS immigration officer and the 287(g) Agreement between ICE and the Sheriff's office. The trial court held a hearing to settle the record on appeal. The trial court ordered the 287(g) Agreement to be included in the record on appeal and the signed Form I-200 warrant for Lopez not to be included.

The record on appeal was filed and docketed with this Court on 27 March 2018. Prior to the Sheriff submitting his brief, Petitioners filed a motion to strike the 287(g) Agreement and a petition for writ of certiorari challenging the trial court's order, which had settled the record on appeal. By an order issued 4 May 2018, this Court denied Petitioners' petition for writ of certiorari "without prejudice to assert argument in direct appeal." Petitioners' motion to strike the 287(g) Agreement from the record on appeal was dismissed by an order of this Court entered 12 September 2018.

On 27 April 2018, the United States filed a motion for leave to file an *amicus curiae* brief. By an order dated 1 May 2018, this Court allowed the United States' ("*Amicus*") motion.

On 27 April 2018, the Sheriff filed his appellate brief. Included in the appendix to the brief was a copy of the ICE Operations Manual. On 2 July 2018, Petitioners filed a motion to strike the ICE Operations Manual from the Sheriff's brief. This Court denied Petitioners' motion to strike the ICE Operations Manual by an order entered 12 September 2018.

## II. Jurisdiction

Jurisdiction to review this appeal lies with this Court pursuant to the Court's order granting the Sheriff's petitions for writs of certiorari and prohibition entered 22 December 2017. N.C. Gen. Stat. § 1-269 (2017).

## III. Analysis

The Sheriff, Petitioners, and *Amicus* all present the same arguments with regard to both Petitioners. We review the parties' arguments as applying to both of the superior court's orders.

The Sheriff argues the superior court was without jurisdiction to consider Petitioners' petitions for writs of *habeas corpus*, or to issue the writs, because of the federal government's exclusive control over immigration under the United States Constitution, the authority delegated to him under the 287(g) Agreement, and under the administrative warrants and immigration detainers issued against Petitioners. *See* 8 U.S.C. § 1357(g)(10)(A)-(B).

### A. *Mootness*

**[1]** Petitioners initially argue the cases are moot, because the Sheriff has turned Petitioners over to the physical custody of ICE. The Sheriff argues that even if the cases are moot, the issues fall within an exception to the mootness doctrine.

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed [as moot.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted).

The issues in the case before us are justiciable where the question involves is a "matter of public interest." *Matthews v. Dep't of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). "In such cases the courts have a duty to make a determination." *Id.* (citation omitted).

Even if the Sheriff is not likely to be subject to further *habeas* petitions filed by Chavez and Lopez or orders issued thereon, this matter involves an issue of federal and state jurisdiction to invoke the "public interest" exception to mootness. Under the "public interest" exception to mootness, an appellate court may consider a case, even if technically moot, if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). Our appellate courts have previously applied the "public interest" exception to otherwise moot cases of clear and far-reaching significance, for members of the public beyond just the

parties in the immediate case. *See, e.g.*, *Granville Cty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) (applying the "public interest" exception to review case involving location of hazardous waste facilities); *In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (applying the "public interest" exception to police officers' challenge of a State Bureau of Investigation procedure for handling personnel files containing "highly personal information" and recognizing that "the issues presented . . . could have implications reaching far beyond the law enforcement community").

Similar to the procedural posture of the Sheriff's appeal, this Court applied the "capable of repetition, but evading review" as well as the "public interest" exception in *State v. Corkum* to review a defendant's otherwise moot appeal, which was before this Court on a writ of certiorari. *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of felon's confinement credit under structured sentencing under the Justice Reinvestment Act of 2011 required review because "all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge's discretion from being resolved").

The Sheriff's appeal presents significant issues of public interest because it involves the question of whether our state courts possess jurisdiction to review *habeas* petitions of alien detainees ostensibly held under the authority of the federal government. This issue potentially impacts *habeas* petitions filed by suspected illegal aliens held under 48-hour ICE detainers directed towards the Sheriff and the many other court and local law enforcement officials across the state. The Sheriff's filings show that several other habeas petitions filed by ICE detainees were pending and acted upon, but held in abeyance after a writ of prohibition was issued by this Court. Prompt resolution of this issue is essential because it is likely other *habeas* petitions will be filed in our state courts, which impacts ICE's ability to enforce federal immigration law.

Resolution of the Sheriff's appeal potentially affects many other detainees, local law enforcement agencies, ICE, and other court and public officers and employees. For the reasons above and in the interest of the public, we review the Sheriff's appeal. *See Randolph*, 325 N.C. at 701, 386 S.E.2d at 186; *Corkum*, 224 N.C. App. at 132, 735 S.E.2d at 423.

B. *Judicial Notice of 287(g) Agreement*

**[2]** The Sheriff included the 287(g) Agreement between his office and ICE in the record to this Court to support his arguments on appeal.

Notwithstanding the multiple prior rulings on this issue, Petitioners argue this Court should not consider the 287(g) Agreement between the Sheriff and ICE in deciding the matter because the 287(g) Agreement was not submitted to the superior court.

As previously ruled upon by the superior court and this Court, the 287(g) Agreement is properly in the record on appeal and bears upon the issue of whether the superior court possessed subject matter jurisdiction to consider the petitions and issue these writs of *habeas corpus*. An appellate court may also consider materials that were not before the lower tribunal to determine whether subject matter jurisdiction exists. *See N.C. ex rel Utils. Comm'n. v. S. Bell Tel.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323-24 (1976); N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017) ("A court may take judicial notice, whether requested or not").

> The device of judicial notice is available to an appellate court as well as a trial court. This Court has recognized in the past that important public documents will be judicially noticed. Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic[.]

*S. Bell*, 289 N.C. at 288, 221 S.E.2d at 323-24 (internal quotation and citations omitted).

In *Bell*, the Supreme Court of North Carolina judicially noticed an order from the Utilities Commission to assess whether an appeal by a telephone company was moot. *Id.*; *see also State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977) (taking judicial notice of the North Carolina Rate Bureau's filing with the Commissioner of Insurance).

The 287(g) Agreement between the Sheriff and ICE is a controlling public document. ICE maintains listings and links to all the current 287(g) agreements it has entered into with local law enforcement entities across the United States on its website, including the 28 February 2017 Agreement with the Sheriff. *See* U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last visited Oct. 18, 2018).

As part of the record on appeal and as verified above, we review the 287(g) Agreement, as an applicable public document, for the purpose of considering the trial court's subject matter jurisdiction to rule upon Petitioners' *habeas* petitions. *See S. Bell*, 289 N.C. at 288, 221 S.E.2d at

323-24. Petitioners' argument that we should not consider the 287(g) Agreement because it was not presented to the superior court is wholly without merit and is dismissed.

C. *Superior Court Lacked Subject-Matter Jurisdiction*

**[3]** The Sheriff and *Amicus* assert the superior court lacked subject matter jurisdiction to review Petitioners' *habeas* petitions, issue writs of *habeas corpus*, and order Petitioners' release. The Sheriff' argues the superior court "had no jurisdiction to rule on immigration matters under the guise of using this state's habeas corpus statutes, because immigration matters are exclusively federal in nature." Petitioners respond and assert the superior court had jurisdiction to issue the writs of *habeas corpus* because "the Sheriff and his deputies did not act under color of federal law."

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). Whether subject matter jurisdiction exists over a matter is firmly established:

> Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial. The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.

*In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006) (citations and internal quotation marks omitted).

"The standard of review for lack of subject matter jurisdiction is *de novo*." *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009). "In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings." *Id.*

Before addressing the Sheriff's argument, we initially address Petitioners' contention that the superior court could exercise subject matter jurisdiction on these matters. Petitioners argue "North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]"

Pursuant to 8 U.S.C. § 1357(g)(1):

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State,

> pursuant to which an officer . . . of the State . . ., who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or *detention of aliens* in the United States . . . may carry out such function at the expense of the State . . . *to the extent consistent with State and local law*. (emphasis supplied).

The General Assembly of North Carolina expressly enacted statutory authority for state and local law enforcement agencies and officials to enter into 287(g) agreements with federal agencies. The applicable statute states:

> *Where authorized by federal law*, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency. *State and local law enforcement officers authorized under this provision are authorized to hold any office or position with the applicable federal agency* required to perform the described functions. (emphasis supplied).

N.C. Gen. Stat. § 128-1.1(c1) (2017). 8 U.S.C. § 1357(g)(1) permits the Attorney General to enter into agreements with local law enforcement officers to authorize them to "perform a function of an immigration officer" to the extent consistent with state law.

Petitioners contend N.C. Gen. Stat. § 162-62 prevents local law enforcement officers from performing the functions of immigration officers or to assist DHS in civil immigration detentions. N.C. Gen. Stat. § 162-62 (2017) provides:

> (a) When any person charged with a felony or an impaired driving offense is confined for any period in a county jail . . . the administrator . . . shall attempt to determine if the prisoner is a legal resident of the United States by an inquiry of the prisoner, or by examination of any relevant documents, or both.
>
> (b) *If the administrator . . . is unable to determine if that prisoner is a legal resident or citizen of the United States . . . the administrator . . .* ***shall*** *make a query of Immigration and Customs Enforcement of the United*

> *States Department of Homeland Security*. If the prisoner has not been lawfully admitted to the United States, the United States Department of Homeland Security will have been notified of the prisoner's status and confinement at the facility by its receipt of the query from the facility.
>
> (c) Nothing in this section shall be construed to deny bond to a prisoner or to prevent a prisoner from being released from confinement *when that prisoner is otherwise eligible for release*. (Emphasis supplied).

Petitioners purport to characterize N.C. Gen. Stat. § 162-62(c) as forbidding sheriffs from detaining prisoners who are subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Petitioners' assertion of the applicability of this statute is incorrect.

N.C. Gen. Stat. § 162-62 specifically refers to a sheriff's *duty to inquire* into a prisoner's immigration status and, if that prisoner is within the country unlawfully, mandates the sheriff "shall" notify DHS of the prisoner's "status and confinement." *Id.* N.C. Gen. Stat. § 162-62 does not refer to a 287(g) agreement, federal immigration detainer requests, administrative warrants or prevent a sheriff from performing immigration functions pursuant to a 287(g) agreement, or under color of federal law. *See id.*

N.C. Gen. Stat. § 162-62(c) only provides that "*[n]othing in this section* shall be construed . . . to prevent a prisoner from being released from confinement when that prisoner is *otherwise eligible for release*." (Emphasis supplied). This statute does not mandate a prisoner must be released from confinement, only that nothing in that specific section dealing with reporting a prisoner's immigration status shall prevent a prisoner from being released when they are "otherwise eligible." *Id.*

N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements under 8 U.S.C. § 1357(g) and perform the functions of immigration officers, including detention of aliens. No conflict exists in the statutes between N.C. Gen. Stat. §§ 162-62 and 128-1.1.

Even though Petitioners assert these two statutes are inconsistent, N.C. Gen. Stat. § 128-1.1 controls over N.C. Gen. Stat. § 162-62, as the more specific statute. "[W]here two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement agencies to enter into agreements with the federal government to perform the functions of immigration officers under 8 U.S.C. § 1357(g), as present here. The express language of 8 U.S.C. § 1357(g)(1) lists the "detention of aliens within the United States" as one of the "function[s] of an immigration officer."

N.C. Gen. Stat. § 162-62 does not specifically regulate the conduct of sheriffs acting as immigration officers pursuant to a 287(g) agreement under 8 U.S.C. § 1357(g), or under color of federal law. Instead, N.C. Gen. Stat. § 162-62 imposes a specific and mandatory duty upon North Carolina sheriffs, as administrators of county jails, to inquire, verify, and report a detained prisoner's immigration status. N.C. Gen. Stat. § 162-62.

Contrary to Petitioners' argument, North Carolina law does not forbid state and local law enforcement officers from performing the functions of federal immigration officers, but the policy of North Carolina as enacted by the General Assembly, expressly authorizes sheriffs to enter into 287(g) agreements to permit them to perform such functions. *See* N.C. Gen. Stat. § 128-1.1. We reject and overrule their contention that "North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]"

D. *Federal Government's Supreme and Exclusive Authority over Immigration*

**[4]** The Sheriff contends the superior court did not possess subject matter jurisdiction in these cases. We agree.

The Supremacy Clause of the Constitution of the United States establishes that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Nearly 200 years ago, the Supreme Court of the United States held the Supremacy Clause prevents state and local officials from taking actions or passing laws to "retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4 L. Ed. 579 (1819).

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394, 183 L. Ed. 2d 351, 366 (2012). This broad authority derives from the federal government's delegated and enumerated constitutional power "[t]o establish an uniform Rule of Naturalization[.]" U.S. Const. art. I, § 8, cl. 4. "Power to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*,

424 U.S. 351, 354, 47 L. Ed. 2d 43 (1976), *superseded by statute on other grounds as recognized in Arizona*, 567 U.S. at 404, 183 L. Ed. 2d at 372.

The Sheriff cites several other states' appellate court decisions, which hold state courts lack jurisdiction to consider petitions for writs of *habeas corpus* and other challenges to a detainee's detention pursuant to the federal immigration authority. *See Ricketts v. Palm Beach County Sheriff*, 985 So. 2d 591 (Fla. Dist. Ct. App. 2008); *State v. Chavez-Juarez*, 185 Ohio App. 3d 189, 192, 923 N.E.2d 670, 673 (2009).

In *Ricketts*, the Court of Appeals of Florida addressed a similar situation to the instant case. Ricketts was arrested on a state criminal charge and detained by the sheriff. *Ricketts*, 985 So. 2d at 591. His bond was set at $1,000; however, the sheriff refused to accept the bond and release Ricketts, due to a federal immigration hold issued by ICE. *Id.* As in the present case, Ricketts first sought *habeas corpus* relief in state court. *Id.* at 592. The trial court denied all relief, reasoning that the issues were within the exclusive jurisdiction of the federal government. *Id.*

On appeal, the Court of Appeals of Florida agreed with the trial court "that appellant cannot secure *habeas corpus* relief from the state court on the legality of his federal detainer." *Id.* The court reasoned that the constitutionality of his detention pursuant to the immigration hold "is a question of law for the federal courts." *Id.* at 592-93. The court further explained that "a state court cannot adjudicate the validity of the federal detainer, as the area of immigration and naturalization is within the exclusive jurisdiction of the federal government." *Id.* at 593 (citing *Plyler v. Doe*, 457 U.S. 202, 225, 72 L. Ed. 2d. 786, 804 (1982); and *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43 ("Power to regulate immigration is unquestionably exclusively a federal power")).

The Court of Appeals of Ohio followed the Florida Court of Appeals' decision in *Ricketts* and reached a similar conclusion in *Chavez-Juarez*. Chavez was arrested for operating a vehicle under the influence of alcohol. *Chavez-Juarez*, 185 Ohio App. at at 193, 923 N.E.2d at 673. After arraignment, the state court ordered Chavez released; however, he was held pursuant to a federal immigration detainer, was turned over to ICE, and deported to Mexico. *Id.* at 193-94, 923 N.E.2d at 674. His attorney filed a motion to have ICE officers held in contempt for violating the state court's release order. *Id.* at 194, 923 N.E.2d at 674.

The trial court concluded that it lacked jurisdiction over ICE and denied the contempt motion, because the federal courts have pre-emptive jurisdiction over immigration issues. *Id.* at 199, 923 N.E.2d at 679. The Ohio Court of Appeals recognized "Control over immigration and

naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." *Id.* (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 10, 53 L. Ed. 2d 63 (1977)).

The Ohio Court of Appeals affirmed the trial court's denial of the contempt motion, and stated:

> Under federal regulation, the Clark County Sheriff's Office was required to hold Chavez for 48 hours to allow ICE to assume custody. Chavez's affidavit indicates that he was held in state custody for approximately 48 hours after the trial court released him on his own recognizance. If Chavez wished to challenge his detention, the proper avenue at that point would have been to file a petition in the federal courts, not an action in contempt with the state court, which did not have the power to adjudicate federal immigration issues.

*Id.* at 202, 923 N.E.2d at 680.

We find the reasoning in both *Ricketts* and *Chavez-Juarez* persuasive and their applications of federal immigration law to state proceedings to be correct.

A state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters. *See Plyler*, 457 U.S. at 225, 72 L. Ed. 2d. at 804; *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43. The superior court did not possess subject matter jurisdiction, or any other basis, to receive and review the merits of Petitioners' *habeas* petitions, or issue orders other than to dismiss for lack of jurisdiction, as it necessarily involved reviewing and ruling on the legality of ICE's immigration warrants and detainer requests.

E. *State Court Lacks Jurisdiction Even Without Formal Agreement*

**[5]** Even if the express 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law permits and empowers state and local authorities and officers to "communicate with [ICE] regarding the immigration status of any individual . . . or otherwise to cooperate with [ICE] in the identification, apprehension, *detention*, or removal of aliens not lawfully present in the United States" in the absence of a formal agreement. 8 U.S.C. § 1357(g)(10)(A)-(B) (emphasis supplied).

A state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants

issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration. *See* U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. VI, cl. 2.; *Nyquist*, 432 U.S. at 10, 53 L. Ed. 2d at 63; *Plyler*, 457 U.S. at 225, 72 L. Ed. 2d. at 804; *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43.

F. *State Court Lacks Jurisdiction to Order Release of Federal Detainees*

**[6]** An additional compelling reason that prohibits the superior court from exercising jurisdiction to issue *habeas* writs to alien petitioners, is a state court's inability to grant *habeas* relief to individuals detained by federal officers acting under federal authority.

Nearly 160 years ago, the Supreme Court of the United States held in *Ableman v. Booth* that "No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524, 6 L. Ed. 169, 176 (1859).

The Supreme Court of the United States reaffirmed this principle in *In re Tarble*, in which the Court stated:

> State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused.*
>
> . . .
>
> *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.* They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United

> States. If he has committed an offence against their laws, *their tribunals alone* can punish him. If he is wrongfully imprisoned, *their judicial tribunals can release* him and afford him redress.
>
> . . .
>
> [*T*]*hat the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States*; that is, an authority the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, *it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.*

*In re Tarble*, 80 U.S. (13 Wall) 397, 409-11, 20 L. Ed. 597, 601-02 (1871) (emphasis supplied) (citations omitted).

In sum, if a prisoner's *habeas* petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of *habeas corpus*. *See id.*

It is undisputed the Sheriff's continued detention of Petitioners, after they were otherwise released from state custody, was pursuant to the federal authority delegated to his office under the 287(g) Agreement. Appendix B of the 287(g) Agreement states, in relevant part:

> This Memorandum of Agreement (MOA) is between the U.S. Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) and the Law Enforcement [Mecklenburg County Sheriff's Office] (MCSO), pursuant to which selected MCSO personnel are authorized to perform immigration enforcement duties in specific situations *under Federal authority*. (Emphasis supplied).

Although the 287(g) Agreement was not attached to Petitioners' *habeas* petitions, the petitions indicated to the court the Sheriff was acting under color of federal authority, if not actual federal authority. Petitioners' petitions acknowledge and specifically assert the Sheriff was purporting to act under the authority of the United States by detaining

them after they would have otherwise been released from custody for their state criminal charges.

Petitioners' petitions both acknowledge and assert the Sheriff was detaining them "at the behest of the federal government." Petitioners' *habeas* petitions refer to the 287(g) Agreement. Copies of the Form I-200 immigration arrest warrant and Form I-247A detainer request were attached to Chavez's *habeas* petition submitted to the superior court.

A copy of the Form I-200 warrant was attached to Lopez's *habeas* petition, and the petition itself refers to the existence of the Form I-247A detainer, stating: "the jail records, which have been viewed by counsel, indicate that there is an immigration detainer lodged against [Lopez] pursuant to a Form I-247[.]"

Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under a 287(g) agreement. The statute provides: "In performing a function under this subsection [§ 1357(g)], an officer or employee of a State or political subdivision of a State *shall be subject to the direction and supervision of the Attorney General* [*of the United States*.]" 8 U.S.C. § 1357(g)(3) (emphasis supplied).

The Sheriff was acting under the actual authority of the United States by detaining Petitioners under the immigration enforcement authority delegated to him under the 287(g) Agreement, and under color of federal authority provided by the administrative warrants and Form I-247A detainer requests for Petitioners issued by ICE. Petitioners' own *habeas* petitions also indicate the Sheriff was acting under color of federal authority for purposes of the prohibitions against interference by state courts and state and local officials. *See Tarble*, 80 U.S. (13 Wall) at 409, 20 L. Ed. at 601.

The next issue is whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining Petitioners pursuant to the detainer requests and administrative warrants. *See id.* After careful review of state and federal authorities, no court has apparently decided the issue of whether a state or local law enforcement officer is considered a federal officer when they are performing immigration functions authorized under a 287(g) Agreement.

In contexts other than immigration enforcement, several federal district courts and United States courts of appeal for various circuits have held state and local law enforcement officers are "federal officers" when they have been authorized or deputized by federal law enforcement

agencies, such as the Drug Enforcement Agency, Federal Bureau of Investigation, and the United States Marshals Service. *United States v. Martin*, 163 F. 3d 1212, 1214-15 (10th Cir. 1998) (holding that local police officer deputized to participate in a FBI narcotics investigation is a federal officer within the meaning of 18 U.S.C. § 115(a)(1)(B) [defining the crime of threatening to murder a federal law enforcement officer]); *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988) (holding that local police officer deputized to participate in a DEA investigation is a federal officer within the meaning of 18 U.S.C. § 111 [defining the crime of assault on a federal official]); *United States v. Diamond*, 53 F.3d 249, 251-52 (9th Cir. 1995) (holding that a state official specially deputized as a U.S. Marshal was an officer of the United States even though he was not technically a federal employee); *DeMayo v. Nugent*, 475 F. Supp. 2d 110, 115 (D. Mass. 2007) ("State police officers deputized as federal agents under the DEA constitute federal agents acting under federal law"), *rev'd on other grounds*, 517 F. 3d 11 (1st Cir. 2008).

The United States Court of Appeals for the Fourth Circuit specifically recognized an employee of the State of North Carolina as being a federal officer for purposes of the assault on an federal officer statute, when the state employee was assisting the Internal Revenue Service. *United States v. Chunn*, 347 F. 2d 717, 721 (4th Cir. 1965). The Fourth Circuit has also held that under a 287(g) Agreement, local law enforcement officers effectively become federal officers of ICE, as they are deputized to perform immigration-related enforcement functions. *United States v. Sosa-Carabantes*, 561 F. 3d 256, 257 (4th Cir. 2009) ("The 287(g) Program permits ICE to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement." (citing 8 U.S.C. § 1357(g)(1))).

The United States Court of Appeals for the Fifth Circuit recently stated, "Under [287(g) agreements], state and local officials become de facto immigration officers[.]" *City of El Cenizo v. Texas*, 890 F. 3d 164, 180 (5th Cir. 2018); *see also People ex rel. Norfleet v. Staton*, 73 N.C. 546, 550 (1875) ("[T]here is no difference between the acts of *de facto* and *de jure* officers so far as the public and third persons are concerned").

To the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find these federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants. *See Martin*, 163 F.3d at 1214-15; *Torres*, 862 F. 2d at 1030; *Sosa-Carabantes*, 561 F. 3d at 257; *El Cenizo*, 890 F.3d at 180.

Petitioners' *habeas* petitions clearly disclosed Petitioners were being detained under express, and color of, federal authority by the Sheriff, who was acting as a *de facto* federal officer. *See El Cenizo*, 890 F. 3d at 180. Under the rule enunciated by the Supreme Court of the United States in *Ableman* and expanded upon in *Tarble*, the superior court was without jurisdiction, or any other basis, to receive, review, or consider Petitioners' *habeas* petitions, other than to dismiss for want of jurisdiction, to hear or issue writs of *habeas corpus*, or intervene or interfere with Petitioner's detention in any capacity. *Ableman*, 62 U.S. (21 How.) at 524, 6 L. Ed. at 176; *Tarble*, 80 U.S. (13 Wall.) at 409. 20 L. Ed. at 607.

The superior court should have dismissed Petitioners' petitions for writs of *habeas corpus*. *See* N.C. Gen. Stat. § 17-4(4) (2017) ("Application to prosecute the writ [of *habeas corpus*] shall be denied . . . [w]here no probable ground for relief is shown in the application."). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The orders of the superior court, which purported to order the release of Petitioners, are vacated. *Id.*

The proper jurisdiction and venues where Petitioners may file their *habeas* petitions is in the appropriate federal tribunal. *See* 28 U.S.C. §2241(a); *Tarble*, 80 U.S. (13 Wall.) at 411, 20 L. Ed. at 602 ("If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release").

## IV. Conclusion

The superior court lacked any legitimate basis and was without jurisdiction to review, consider, or issue writs of *habeas corpus* for alien Petitioners not in state custody and held under federal authority, or to issue any orders related thereon to the Sheriff. State or local officials and employees purporting to intervene or act constitutes a prohibited interference with the federal government's supreme and exclusive authority over the regulation of immigration and alienage. *See* U.S. Const. art. I, § 8, cl. 4; *Ableman*, 62 U.S. (21 How.) at 524, 6 L. Ed. at 176; *Tarble*, 80 U.S. at 409. 20 L. Ed. at 607.

The superior court was on notice the Petitioners were detained under the express, and color of, exclusive federal authority. The Sheriff was acting as a federal officer under the statutorily authorized and

executed 287(g) Agreement. The orders appealed from are vacated for lack of jurisdiction and remanded to the trial court with instructions to dismiss Petitioners' *habeas* petitions.

A certified copy of this opinion and order shall be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar. *It is so ordered.*

VACATED and REMANDED.

Judge BERGER concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring.

I concur in the majority opinion. I write separately to address the majority's language ordering a certified copy of this opinion to be delivered to the ethical bodies that oversee lawyers and judges. Last year, this Court entered a writ of prohibition barring the trial court from issuing any further writs of habeas corpus on this issue. Based on timeframes discussed at oral argument, and the fact that at least one trial judge entered an order addressing the merits of a similar habeas petition while the writ of prohibition was in effect (although that judge properly held the order in abeyance pending the outcome of this appeal), this Court is concerned that our writ of prohibition may not have been followed with respect to other undocumented immigrants involved in other habeas cases not before the Court. The majority thus orders a copy of the opinion to be sent to the State Bar's Disciplinary Hearing Commission and the Judicial Standards Commission so that these governing bodies are aware of it, should there be any allegations that this Court's writ of prohibition was ignored. But I recognize that this language in the majority opinion can be misinterpreted as a suggestion that lawyers or judges involved in the proceedings described in this opinion committed misconduct. To be clear, they did not.

NATIONSTAR MORTGAGE LLC, D/B/A CHAMPION MORTGAGE COMPANY, PLAINTIFF
v.
JERRY CURRY AND PAMELA CURRY; MELISSA CARLTON HOLMES; RAY M. WARREN, JR.; J. GREGORY MATTHEWS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EULALA WARREN MCNEIL; SECRETARY OF HOUSING & URBAN DEVELOPMENT; AND SATTERFIELD LEGAL, PLLC, AS TRUSTEE, DEFENDANTS

No. COA18-351

Filed 6 November 2018

**1. Process and Service—notice of special proceeding—affidavit of service—presumption of valid service**

In a special proceeding to sell property to repay the debts of an estate, an affidavit of service meeting the requirements of N.C.G.S. § 1-75.10 sufficiently showed proof of service to provide notice to the holder of a deed of trust on the subject property. The holder of the deed of trust failed to rebut the presumption of valid service arising from the affidavit, and admitted it had been served and received prior notice of the special proceeding, despite not being named in the caption of the petition.

**2. Liens—special proceeding—sale of estate property—prior recorded lien extinguished**

In a special proceeding to sell property to repay the debts of an estate, the trial court did not err in concluding the sale of the property extinguished a prior recorded lien on the property. Since the lienholder was made a party to and therefore was bound by the special proceeding, its lien followed the proceeds of the sale. Even though the proceeds were embezzled, the buyers paid for the property and took it free and clear of the lien.

Appeal by plaintiff from order entered 27 September 2017 by Judge Susan E. Bray in Wilkes County Superior Court. Heard in the Court of Appeals 3 October 2018.

*McGuireWoods, LLP, by Christopher B. Karlsson, for plaintiff-appellant.*

*McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellees Jerry Curry and Pamela Curry.*

TYSON, Judge.

Nationstar Mortgage, LLC, d/b/a Champion Mortgage Company ("Champion"), appeals from the trial court's order, which granted Jerry and Pamela Curry's (collectively "the Currys") motion for judgment on the pleadings. We affirm.

## I. Background

In 2011, Eulala W. McNeil, now deceased, owned two tracts of real property located in Wilkes County ("the Property"). On 25 January 2011, McNeil obtained a loan from and executed a promissory note payable to Sidus Financial, LLC ("Sidus"), which was secured by a deed of trust on the Property in favor of Sidus ("the Deed of Trust"). The Deed of Trust was recorded with the Wilkes County Register of Deeds on 31 January 2011 and encumbered the Property.

That same day, Sidus transferred its rights in the Deed of Trust to Metlife Home Loans, a division of Metlife Bank, N.A. ("Metlife"), through an assignment of deed of trust that was also properly recorded. Subsequently, Metlife assigned the Deed of Trust to Champion on 15 October 2012. Champion properly recorded this assignment of deed of trust the same day.

McNeil died on 11 August 2012, and Melissa Carlton Holmes was subsequently appointed as executrix of McNeil's estate. On 13 December 2012, Holmes filed a petition ('the Petition") in special proceeding 12 SP 368 ("the Special Proceeding") to seek a sale of the Property in order to repay the debts of the estate. The only respondent party named in the Petition was Ray M. Warren, an heir of McNeil.

On 18 December 2012, Holmes filed an amended petition ("the Amended Petition"), adding Metlife, Sidus, and "HUD" as additional respondent parties. Neither petition named Champion in the caption of the case. However, both the Petition and Amended Petition described Champion's Deed of Trust on the Property as a debt of the estate. Specifically, the Petition stated one of the debts of the estate was "[t]he previously stated reverse mortgage owed to Champion Lender in the current amount of $66,988.86" and petitioner prayed for the court to "sell [the Property] in order to create assets to pay the taxes and above referenced debts of the Estate."

On 26 March 2013, Robert G. Green, Jr., Esq., the attorney of record in the Special Proceeding, filed an affidavit of service by certified mail ("the Affidavit of Service") stating he had served Champion "with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons" by certified mail. Green also attached a copy of

the signed receipt, which showed Champion had received these documents on 23 March 2013.

On 26 April 2013, the Wilkes County Clerk of Superior Court entered an order ("the Order of Sale") authorizing the sale of the Property. The Order of Sale listed the "reverse mortgage owed to Champion" as one of the debts of the estate and concluded as a matter of law that the Property should be sold to create assets to pay "the above referenced debts of the Estate." Pursuant to the Order of Sale, the appointed commissioner posted a notice of sale ("the Notice of Sale"), which included the following statements: "This sale is subject to ad valorem taxes and such other liens as may appear of record[,]" and "[t]his sale is made subject to all prior liens and encumbrances, and unpaid taxes and assessments."

The sale of the Property was conducted on 26 July 2013. After the sale remained open for a period of time for upset bids to expire, the Currys became the final bidder and purchased the Property for and paid $90,000. On 16 September 2013, the commissioner deducted fees and expenses and disbursed $84,692.69 to the executrix of the McNeil estate as proceeds from the sale of the Property. On 19 September 2013, the commissioner executed and delivered a deed for the Property to the Currys. After receiving the net sale proceeds in her capacity as executrix of the McNeil estate, Holmes embezzled the money and did not remit and pay the proceeds from the sale to extinguish the outstanding balance of the Deed of Trust to Champion.

Champion commenced this action by filing a complaint on 21 February 2017 in superior court to seek a declaration that Champion's Deed of Trust is a first lien on the Property and an order for judicial foreclosure of the Deed of Trust. In their answer, the Currys alleged (1) an affirmative defense that, by operation of collateral estoppel, the Special Proceeding Order of Sale barred Champion's claims ("the Second Affirmative Defense"), and (2) asserted a counterclaim for a declaration that Champion's lien was extinguished by the sale of the Property in the Special Proceeding and their payment of the purchase price ("the First Counterclaim").

The Currys subsequently filed a motion for judgment on the pleadings asserting their First Counterclaim and Second Affirmative Defense. Following a hearing on 18 September 2017, the trial court entered judgment on the pleadings in favor of the Currys on both their First Counterclaim and Second Affirmative Defense. The trial court's order decreed that (1) "Champion Mortgage is collaterally estopped from seeking a judicial sale of [the Property]" and (2) the "Curry[s] hold title to [the Property] free and clear of the lien of [Champion's] Deed of Trust."

Champion filed timely notice of appeal from the trial court's order granting the Currys' motion for judgment on the pleadings.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

## III. Issues

Champion argues the trial court erred by concluding as a matter of law Champion was a named party to and bound by the Special Proceeding. Champion also argues the trial court erred by granting judgment on the Currys' First Counterclaim by decreeing the Special Proceeding extinguished Champion's prior recorded lien on the Property. Lastly, Champion argues the trial court erred in applying the doctrine of collateral estoppel in granting judgment on the Currys' Second Affirmative Defense.

We need not reach the issue of whether Champion was collaterally estopped from seeking a judicial sale of the Property. Because Champion was on notice of and was a party to the Special Proceeding, the Currys acquired the Property free and clear of Champion's Deed of Trust.

## IV. Standard of Review

The trial court's order granted the Currys' motion for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c). However, when "matters outside the pleadings [have been] considered by the [trial] court in reaching its decision on the judgment on the pleadings, the motion [is] treated as if it were a motion for summary judgment" under Rule 56 on review by this Court. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) (citation omitted).

In making its decision on the Currys' motion for judgment on the pleadings, the trial court's order stated the court had considered the pleadings and exhibits, arguments of counsel at the hearing, and certain documents from the Special Proceeding file submitted during the 18 September 2017 hearing. One of these documents from the Special Proceeding file was the Affidavit of Service asserting Champion was served "with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons" by certified mail with return receipt. With these documents outside the pleadings being considered, the 12(c) motion for judgment on the pleadings will be treated for review as a motion for summary judgment under Rule 56 on appeal. *See Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617

(2012) ("Our case law has consistently treated submission of affidavits as a matter outside the pleadings." (citation omitted)).

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

*Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). "If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied." *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985).

V. Party to the Special Proceeding

**[1]** Champion argues the trial court erred by concluding as a matter of law Champion was a party to and bound by the orders and judgment from the Special Proceeding. Champion asserts "[i]n the absence of a summons and a petition naming, and properly served on, Champion, it could not have been a party to the Special Proceeding." The Currys assert the Affidavit of Service from the Special Proceeding complies with the requirements for proof of service and shows Champion was a party to and bound by the Special Proceeding.

Rule 4(j)(1)(c) of our Rules of Civil Procedure permits service by certified mail "[b]y mailing a copy of the summons and of the complaint, . . . return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2017). Once service by certified mail is complete, the serving party may make proof of service by filing an affidavit in accordance with N.C. Gen. Stat. § 1-75.10. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2017).

Under N.C. Gen. Stat. § 1-75.10(a)(4) (2017), the affidavit must aver:

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

Such an affidavit, when filed along with a return receipt signed by the individual who received the mail, "raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2); *see also Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 490-91, 586 S.E.2d 791, 796 (2003).

Here, the Affidavit of Service comports with N.C. Gen. Stat. § 1-75.10. The Affidavit of Service states the petitioner in the Special Proceeding attempted to serve Champion "with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons in the [Special Proceeding] by certified mail, return receipt requested," and that Champion had, in fact, received service of the documents. Attached

to the Affidavit of Service is the return receipt showing delivery to Champion. Therefore, the Currys are entitled to a rebuttable presumption of valid service. *See Carpenter v. Agee*, 171 N.C. App. 98, 100, 613 S.E.2d 735, 736 (2005) ("By filing a copy of the signed return receipt, along with an affidavit that comports with N.C. Gen. Stat. § 1-75.10, plaintiff is entitled to a rebuttable presumption of valid service.").

Champion has failed to rebut this presumption. At the 18 September 2017 hearing, Champion argued the person who had signed the receipt was not its registered agent. However, to rebut the presumption of regular service, Champion needed to "present evidence that service of process failed to accomplish its goal of providing [it] with notice of the [Special Proceeding], rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons." *Granville*, 160 N.C. App. at 493, 586 S.E.2d at 797.

Champion's own admission shows that it had received prior notice of the Special Proceeding. Paragraph 59 of the Currys' First Counterclaim states: "[Champion] was made party to the Special Proceeding and was served with summons and a copy of the Petition." In response, Champion stated the following: "[Champion] admits that it was included *as a party to be noticed in the Special Proceedings action . . . .*" (emphasis supplied). This statement shows the Affidavit of Service "accomplish[ed] its goal of providing [Champion] with notice of the [Special Proceeding.]" *See id.* Champion has failed to rebut the presumption of proper service.

Champion further asserts that the trial court erred in concluding it was a party to the Special Proceeding because Champion was never identified in the caption of either the Petition or Amended Petition. Champion cites *Lee v. County of Cumberland* in support of its contention. __ N.C. App. __, 809 S.E.2d 407, 2018 WL 710085 at *1 (2018) (unpublished). *Lee* is an unpublished opinion and, therefore, lacks precedential value. N.C. R. App. P. 30(e)(3). Nonetheless, this Court finds it instructive.

In *Lee*, the plaintiff sent the defendant, Keating, a copy of the amended complaint by certified mail; however, the plaintiff failed to name Keating in the caption of his complaint and never mentioned Keating in the body of the complaint. *Id.* at *7. This Court held "[b]ecause Plaintiff failed to name Keating in the caption of his complaint, and because Plaintiff failed to mention Keating in the body of the complaint, we conclude the trial court properly granted the motion to dismiss as to Keating." *Id.*

In reaching this decision, the Court relied on *Roberts v. Hill*, stating:

> In *Roberts v. Hill*, . . . the plaintiff named a defendant in the complaint's caption, but failed to make any allegations against that defendant *in the body of his complaint*. Our State Supreme Court directed the defendant's name be stricken from the complaint *since there were no allegations against that defendant*. Here, as in *Roberts*, Plaintiff fails to make any allegations against Keating in the body of his complaint, in addition to failing to name Keating in his complaint's caption.

*Id*. (emphasis supplied) (citation omitted) (quoting *Roberts v. Hill*, 240 N.C. 373, 377, 82 S.E.2d 373, 377 (1954)).

The facts here are readily distinguishable from both *Lee* and *Roberts*. Although neither petition named Champion as such in the caption, the body of both the Petition and Amended Petition described Champion's Deed of Trust mortgage, listed the amount owed to Champion on this mortgage, and stated the Property should be sold to pay off Champion's debt. Because the body of the Petition and Amended Petition alerted Champion to the nature of the Special Proceeding and asserted allegations specifically naming Champion, the mere failure to include Champion's name in the caption is not fatal. *See Roberts*, 240 N.C. at 377, 82 S.E.2d at 377.

The Affidavit of Service shows the sale to the Currys was entitled to a rebuttable presumption of valid service of the "Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons[,]" and Champion has failed to rebut this presumption. Further, Champion's own admission indicates that it had been served and received prior notice of the Special Proceeding. Although the Petition and Amended Petition failed to name Champion in the caption, the body of these documents specifically named Champion's mortgage and provided Champion with notice of the Special Proceeding. For these reasons, Champion was a named party within and bound by the Special Proceeding. This assignment of error is dismissed.

## VI. Status of Champion's Deed of Trust

**[2]** Champion argues the trial court erred by granting judgment on the Currys' First Counterclaim by declaring the Special Proceeding had extinguished Champion's prior recorded lien on the Property. We disagree.

As an initial matter, Champion, in its complaint, requested the trial court to declare that equitable title to the Property is vested in Champion and legal title is vested in the trustee of the Deed of Trust. Under North Carolina law, "[a] mortgage or deed of trust to secure a debt passes legal title to the mortgagee or trustee, as the case may be, but the mortgagor or trustor is looked on as the equitable owner of the land . . . ." *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 101, 258 S.E.2d 379, 385 (1979). N.C. Gen. Stat. § 28A-15-2(b) (2017) states:

> The title to real property of a decedent is vested in the decedent's heirs as of the time of the decedent's death; but the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent's death[.]

Here, at the time of the Special Proceeding, legal title to the Property was held by the trustee of the Deed of Trust for the benefit of Champion, and Ray M. Warren, Jr. and Melissa Carlton Holmes held equitable title to the Property, as devisees and executrix under the will of Eulala W. McNeil. *See id.*; *see also Complex Inc.*, 43 N.C. App. at 101, 258 S.E.2d at 385.

Chapter 28A of the North Carolina General Statutes governs the administration of a decedent's estate. Section 28A-15-1(a) provides: "All of the real and personal property, *both legal and equitable*, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate[.]" N.C. Gen. Stat. § 28A-15-1(a) (2017) (emphasis supplied).

The executrix or personal representative of the estate may "apply to the clerk of superior court of the county where the decedent's real property . . . is situated, by petition, to sell such real property for the payment of debts and other claims against the decedent's estate." N.C. Gen. Stat. § 28A-17-1 (2017). "When real property sought to be sold, or any interest therein, is claimed by another person, such claimant may be made a party to the proceeding." N.C. Gen. Stat. § 28A-17-6 (2017) (emphasis supplied). In addition, the beneficiary of the deed of trust, not the trustee, is the proper party to be joined in the proceeding to sell real estate of the decedent. *See* N.C. Gen. Stat. § 45-45.3(c) (2017) ("[T]he trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust[.]").

Here, the Wilkes County Clerk of Superior Court had the authority to enter the Order of Sale authorizing the sale of the Property. *See*

N.C. Gen. Stat. §§ 28A-15-1(a); 28A-17-1 (2017). Holmes, as executrix of McNeil's estate, petitioned the clerk of superior court for an order to sell the Property in order to create liquid assets to pay the debts of the estate and the mortgage owed to Champion. As outlined above, Champion was a party to, named in and bound by the Special Proceeding; therefore, the clerk of court had the authority to sell both legal and equitable title in the Property. *See id.*; *see also* N.C. Gen. Stat. §§ 28A-17-6; 45-45.3(c) (2017).

Champion contends that its lien remained attached to the Property *after* the Special Proceeding, regardless of whether it was a named party to the proceeding or not. This contention is without merit for several reasons.

Although Chapter 28A does not expressly provide for a sale of real property owned by an estate pursuant to the clerk's order to be free and clear of liens, North Carolina's long standing decisional law supports the view that where the lienholder is named as a party to the proceeding and the order authorizing the sale does not specify that the sale is subject to the lien, the property is sold free and clear of the lien to the purchaser. When the purchase price is paid by the purchaser, said lien is transferred to the proceeds of the sale. *See Jerkins v. Carter*, 70 N.C. 500 (1874); *see also Town of Tarboro v. Pender*, 153 N.C. 427, 69 S.E. 425 (1910); *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946); *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

In *Moore*, the administrator of the estate petitioned the court to have real property of the decedent sold to make liquid assets available to pay the following debts of the estate: (1) costs of administration, (2) a judgment docketed against the decedent, and (3) a deed of trust on real property. 226 N.C. at 150, 36 S.E.2d at 921. The trial court ordered the costs of administration be paid first because N.C. Gen. Stat. § 28-105 (now N.C. Gen. Stat. § 28A-19-6) required personal property to be distributed to the cost of administration before all other debts of the estate. *Id.* at 150-51, 36 S.E.2d at 921-22.

Our Supreme Court reversed the trial court and held that under section 28-105, the statute dictating the order in which debts were to be paid, related exclusively to the application of personal property, and not the realty. *Id.* at 151, 36 S.E.2d at 922. The Supreme Court went on to conclude "when the land is sold to make assets the proceeds remain real estate until all liens are discharged and are to be applied to the payment of such liens in the order of their priority." *Id.*

Champion contends our Supreme Court in *Moore* "made [it] clear that a lien on property sold to make assets remains after the sale."

However, Champion misinterprets this decision. Our Supreme Court in *Moore* held that when real property, which is burdened by a lien, is sold to make assets, the proceeds must first be distributed to satisfy the lien, rather than being distributed in accordance with the priority set by the statute governing the distribution of funds from personal property. *Id.*; *see also Pender*, 153 N.C. at 430, 69 S.E.2d at 426 (holding when the court ordered decedent's real property to be sold, the proceeds must be applied according to the priority of the liens); *Williams*, 230 N.C. at 345, 53 S.E.2d at 282 (holding when real property is sold to make assets, "the proceeds of the sale retain the quality of real property to the extent necessary to discharge all liens thereon").

Because the trial court had incorrectly applied the priority of payment of the proceeds and was reversed, our Supreme Court in *Moore* did not address whether the lien would remain on the real estate if the proceeds of the sale were insufficient to pay off the debt. *See Moore*, 226 N.C. at 152, 36 S.E.2d at 922-23. Nevertheless, *Moore* supports the position that the lien is transferred to the proceeds of the sale and when payment is made the buyer takes the property free and clear when the lienholder is made a party to the sale.

We find additional justification for this position from our Supreme Court in *Jerkins*. *See* 70 N.C. at 501. In *Jerkins*, our Supreme Court stated the following:

> The order of payment of the debts of the decedent is regulated by [statute,] which declares that judgments docketed are in force, have priority to the extent to which they are a lien on the property of the deceased at his death. The extent of the lien is the amount of the judgment, if the land is of greater value, but if the real estate is of less value, the extent of the lien is the value of the land only. Thus, if the value of the real estate is only five hundred dollars, and the personal assets fifteen hundred dollars, and the judgment is for one thousand dollars, the plaintiff would be entitled as a credit, upon his judgment, to five hundred dollars out of the real assets, that is, the value of the real estate, and for the residue of his judgment, he would come in *pro rata* with other creditors, as to the remaining personal assets.

*Id.* The precedents of *Jerkins*, *Pender*, *Moore*, and *Williams*, read and taken together, support the proposition that when a lienholder is joined in a proceeding to sell land to make liquid assets to satisfy debts for a

decedent's estate, the lienholder's lien follows the *proceeds* of the sale and the purchaser of the real estate who paid the purchase price in excess of the lein, takes title free and clear of the lien.

Here, Chapter 28A sets out the procedures for the disposition of a decedent's property and Holmes, as the qualified executrix, followed these procedures. The Order of Sale disposed of both the legal and equitable title to the property, which included Champion's deed of trust, and the Order of Sale specified the purpose of the sale was to make liquid assets to pay the debts of the estate, including the Champion Deed of Trust. *See* N.C. Gen. Stat. § 28A-15-1(a). Because Champion was a party to the Special Proceeding, its lien followed the proceeds of the sale and the Currys took title to the Property free and clear of Champion's lien. *See Jerkins*, 70 N.C. at 501; *Pender*, 153 N.C. at 430, 69 S.E. at 425; *Moore*, 226 N.C. at 151, 36 S.E.2d at 922; *Williams*, 230 N.C. at 345, 53 S.E.2d at 282.

Champion also contends its lien remains upon the Property because the Order of Sale did not explicitly state the sale was to be "free and clear" and the Notice of Sale included the following language: "This sale is subject to ad valorem taxes and such other liens as may appear of record[,]" and "[t]his sale is made subject to all prior liens and encumbrances, and unpaid taxes and assessments."

Even if the Order of Sale did not explicitly state the sale of the real property was to be free and clear of Champion's lien, it did specify that "it [was] in the best interests of the Decedent's Estate and for the necessity of paying the Decedent's just debts" to sell the Property "to create assets with which to pay the taxes and the above referenced debts of the Estate." The Order of Sale listed one of these referenced debts as the "mortgage owed to Champion Mortgage in the current amount of $66,988.86[.]"

The Property was sold pursuant to N.C. Gen. Stat. § 28A-17-1 *et seq.*, which allows the administrator to sell both the legal and equitable title and claims of all parties to the proceeding. As concluded above, Champion was a named party to, was served notice of, and bound by the Special Proceeding. The commissioner of the Special Proceeding under the clerk's order had the judicial authority to sell and convey all interests in the Property. Although the Notice of Sale said the sale was subject to prior liens, the substance of the Order of Sale made it clear the proceeds generated from the sale were directed to pay off these liens and debts of the estate.

Although Champion never received the payoff, due to the executrix absconding with the proceeds, this does not change the fact that the Currys, as last and highest bidder at the sale, paid for the Property and took the Property free and clear of Champion's lien. *See Cherry v. Woolard*, 244 N.C. 603, 613, 94 S.E.2d 562, 568 (1956) ("[I]t [is] not incumbent upon the purchaser at the judicial sale to see that the money paid for the property was properly disbursed." (citation omitted)). "When the purchaser paid his bid into court, or to its officer duly authorized to receive it, he was relieved of any further responsibility in connection with the interest then being sold." *Id.* at 613, 94 S.E.2d at 569 (citation and internal quotation marks omitted). Here, the Currys paid the purchase price, which was well in excess of Champion's lien, to the commissioner under the clerk's order, and had no further duty to ensure that the commissioner or the executrix paid Champion. *See id.*

In North Carolina, an executrix is under a duty to ensure that creditors of the estate are paid according to their class. *See* N.C. Gen. Stat. § 28A-19-13 (2017). If the personal representative fails to pay out claims of the estate in accordance with their class, the personal representative commits a *devastavit*. *Id.*; *see also Coggins v. Flythe*, 113 N.C. 102, 113, 18 S.E. 96, 99 (1893) ("The general rule, both at law and in equity, is that it would be a *devastavit* if an executor or administrator should give preference to a debt of lower class over those duly presented of a higher dignity[.]" (citation omitted)). However, in addressing the respective claims of Champion and the Currys only, which is all that is before us in this case, it is unnecessary for us to address any claims Champion may assert against the commissioner of the Special Proceeding and Holmes as the executrix of McNeil's estate.

Champion was made a party to and received notice of the Special Proceeding. The procedure followed in the Special Proceeding allowed the commissioner to sell the Property to the Currys, as the highest and last bidder at the sale, upon their payment, free and clear of Champion's lien. Although the Notice of Hearing erroneously stated the sale was subject to all prior liens, Champion's lien followed the proceeds, and the substance of the Order of Sale showed the sale of the Property was to be conveyed upon payment as free and clear of Champion's lien. The trial court properly granted judgment on the Currys' First Counterclaim by declaring the Special Proceeding extinguished Champion's prior recorded lien on the Property.

## VII. Conclusion

The Affidavit of Service created a rebuttable presumption of valid service of the petition and summons and Champion failed to rebut this

presumption. The trial court did not err by concluding as a matter of law Champion was a named party to and bound by the Special Proceeding. The trial court also did not err in concluding as a matter of law the Special Proceeding extinguished Champion's prior recorded lien on the Property, which was converted into the paid proceeds of the sale.

The trial court also correctly ruled the Currys, upon payment of proceeds exceeding the lien, took the Property free and clear of the lien. As a result, it is unnecessary for this Court to address Champion's remaining arguments concerning the trial court's application of the doctrine of collateral estoppel.

The order of the trial court granting judgment on the pleadings, as reviewed on appeal for summary judgment under Rule 56, is affirmed. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

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PHG ASHEVILLE, LLC, PETITIONER
v.
CITY OF ASHEVILLE, RESPONDENT

No. COA18-251

Filed 6 November 2018

**1. Zoning—conditional use permit—denied by city council—de novo review by superior court**

In a conditional use case involving the building of a hotel, the superior court review of a city council decision to deny the permit appropriately applied de novo review to determine the initial legal issue of whether petitioner had presented competent, material, and substantial evidence. The superior court's order showed that it did not weigh the evidence.

**2. Zoning—conditional use permit-city council decision—findings—judicial review—individual findings not specifically addressed**

The trial court did not misapply the standard of review in a zoning case involving a conditional use permit for a hotel where it did not specifically address each of the city council's 44 findings

because no competent, material, and substantial evidence was presented to rebut petitioner's prima facie showing. The council's 44 findings were unnecessary, improper, and irrelevant.

**3. Appeal and Error—abandonment of issues—failure to argue**

In an appeal by respondent city in a zoning action involving a conditional use permit, the petitioner's compliance with the seven requirements for a conditional use permit in the city's Uniform Development Ordinance were either unchallenged and established as a matter of law, or the city abandoned any arguments on appeal.

**4. Zoning—conditional use permit—prima facie entitlement—impact on adjoining property—material evidence**

A petitioner seeking a conditional use permit for a hotel presented material evidence to the city council about the hotel's impact on adjoining property. Petitioner's expert testimony had a logical connection to whether the project would impair the value of adjoining property and the city council's lay notion that the expert's analysis was based upon an inadequate methodology did not constitute competent rebuttal evidence.

**5. Zoning—conditional use permit—hotel—harmony with neighborhood**

Petitioner's "use or development" of a property for a hotel established a prima facie case of harmony with the area or neighborhood under the city's Uniform Development Ordinance (UDO). Although the city contended that "use" should be distinguished from "development" in the UDO, petitioner's expert witness established a prima facie case of harmony of the use and development within the area.

**6. Zoning—conditional use permit—hotel—traffic**

Although the city argued in a zoning action involving a conditional use permit for a hotel that petitioner did not establish a prima facie case that the proposed hotel would not cause undue traffic congestion or create a traffic hazard, no competent, material, and substantial evidence was presented to refute an analysis from petitioner's expert traffic engineer. The speculations of lay members of the public and unsubstantiated opinions of city council members did not constitute competent evidence to rebut the expert.

Appeal by respondent from order entered 2 November 2017 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 20 September 2018.

*Smith Moore Leatherwood LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for petitioner-appellee.*

*City of Asheville City Attorney's Office, by City Attorney Robin Tatum Currin and Assistant City Attorney Catherine A. Hofmann, for respondent-appellant.*

TYSON, Judge.

The City of Asheville ("the City") appeals from an order of the superior court reversing the City's denial of a conditional use permit to PHG Asheville, LLC for the construction of a hotel. We affirm.

## I. Background

PHG Asheville, LLC ("Petitioner"), a North Carolina business entity, submitted an application to the City for a conditional use permit ("CUP") on 27 July 2016. Petitioner planned to construct an eight-story, 178,412 square foot Embassy Suites hotel, with 185 rooms and on-site parking structure, to be built upon a 2.05 acre parcel located in downtown Asheville at 192 Haywood Street (the "Project"). The property is zoned "Central Business District," ("CBD"), which includes hotels as a permitted use. The property is also located within the "Downtown Design Review Overlay District" ("DDROD") under the City's Uniform Development Ordinance ("UDO"). Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1) (2016).

Development projects designed to contain a gross floor area greater than 175,000 square feet to be built on parcels zoned CBD and located in the DDROD are subject to the City's "Level III site plan" review. This multi-level review includes a quasi-judicial hearing for issuance of a CUP from the Asheville City Council. Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1),(7) (2016).

The UDO provides the following criteria for issuance of a CUP:

> Conditional use standards. The Asheville City Council shall not approve the conditional use application and site plan unless and until it makes the following findings, based on the evidence and testimony received at the public hearing or otherwise appearing in the record of the case:
>
> (1) That the proposed use or development of the land will not materially endanger the public health or safety;

> (2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;
>
> (3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;
>
> (4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;
>
> (5) That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan, and other official plans adopted by the city;
>
> (6) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities; and
>
> (7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

Asheville, N.C., Code of Ordinances, § 7-16-2(c) (2016).

Petitioner's Project was reviewed by, and received recommendations for approval from, the City's planning department staff, the Technical Review Committee, the Downtown Commission, and the Asheville Planning & Zoning Commission. All of these recommendations were submitted to the City Council. The City Council conducted a quasi-judicial public hearing on Petitioner's CUP application on 24 January 2017.

Petitioner presented three expert witnesses, who testified and were questioned and who submitted detailed reports at the hearing. No evidence was offered in opposition to Petitioner's CUP application. One area resident present at the hearing questioned whether the hotel could possibly create a sight line issue that could affect traffic safety.

At the close of the hearing, the City Council voted to deny Petitioner's application for a CUP. Three weeks later on 14 February 2017, the City issued an order containing 44 written findings of fact and 2 conclusions of law, detailing why it denied Petitioner's requested CUP. The City

concluded the CUP should be denied because Petitioner did not produce competent, material and substantial evidence establishing criteria 1, 2, 3, 4, 5 or 7 of § 7-16-2(c) of the UDO. Aside from its additional 44 findings of fact, the City ultimately found:

> 2. In this case, the City Council finds that the CUP should be denied, for the following reasons, pursuant to UDO Section 7-16-2(c):
>
> > (1) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not materially endanger the public health or safety;
> >
> > (2) The Applicant failed to produce competent, material and substantial evidence that the Hotel is reasonably compatible with significant topographic features of the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;
> >
> > (3) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not substantially injure the value of the adjoining or abutting property;
> >
> > (4) The Applicant failed to produce competent, material and substantial evidence that the Hotel will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located and, moreover, the evidence instead showed the Hotel would not be in harmony with the scale, bulk, coverage and character of the area and neighborhood.
> >
> > (5) The Applicant failed to produce competent, material and substantial evidence that the Hotel will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City and, moreover, the evidence instead showed the Hotel would not generally conform to the City's 2036 Vision Plan; and
> >
> > (7) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not cause undue traffic congestion or create a traffic hazard.

On 16 March 2017, Petitioner filed a petition for writ of certiorari in superior court to seek review of the City's decision. The superior court entered an order after determining *de novo* Petitioner had established a *prima facie* case for entitlement to a CUP. The court concluded the City's decision to deny Petitioner a CUP was arbitrary and capricious, and it reversed and remanded the matter with an order to the City Council to grant Petitioner's requested CUP on 2 November 2017. The City timely appealed from the superior court's order.

## II. Jurisdiction

Jurisdiction lies in this Court from an appeal of right from a final judgment of the superior court. N.C. Gen. Stat. § 7A-27(b) (2017).

## III. Standard of Review

"Judicial review of town decisions to grant or deny conditional use permits is provided for in G.S. 160A-388(e), which states, *inter alia*, 'Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.' " *Coastal Ready-Mix Concrete Co. v. Bd. Of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980).

> [T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:
>
> (1) [r]eviewing the record for errors in law,
>
> (2) [i]nsuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) [i]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [i]nsuring that decisions are not arbitrary and capricious.

*Id.* at 626, 265 S.E.2d at 383.

"The standard of review of the superior court depends upon the purported error." *Little River, LLC v. Lee Cty.*, __ N.C. App. __, __, 809 S.E.2d 42, 46 (2017) (citing *Morris Commc'ns Corp. v. Bd. of Adjustment*

*of Gastonia*, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003)). "When a party alleges the [decision-marking board's] decision was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew." *Dellinger v. Lincoln Cty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (2016) (citation omitted).

"When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation marks omitted). "The whole record test requires that the [superior] court examine all competent evidence to determine whether the decision was supported by substantial evidence." *Morris Commc'ns*, 159 N.C. App. at 600, 583 S.E.2d at 421. The initial issue of whether a petitioner has presented competent, material, and substantial evidence to obtain a special use permit is subject to *de novo* review. *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012).

"[T]he terms 'special use' and 'conditional use' are used interchangeably[.] . . . [A] conditional use or a special use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Concrete Co.*, 299 N.C. at 623, 265 S.E.2d at 381 (quoting *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 136 (1974) (other citation omitted)).

> A particular standard of review applies at each of the three levels of this proceeding—the [council], the superior court, and this Court. First, the [council] is the finder of fact in its consideration of the application for a special use permit. The [council] is required, as the finder of fact, to follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. *If a prima facie case is established, [a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.*

*Davidson Cty. Broad., Inc. v. Rowan Cty. Bd. of Comm'rs*, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007) (emphasis supplied) (citation and internal quotation marks omitted), *disc. review denied*, 362 N.C. 470, 666 S.E.2d 119 (2008).

"When this Court reviews a superior court's order regarding a zoning decision by a [decision-making board], we examine the order to: '(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Id.* at 87, 649 S.E.2d at 910 (citations omitted).

## IV. Analysis

A petitioner's burden on an application for a CUP is well established. An applicant for a CUP must establish a *prima facie* case, by competent, material, and substantial evidence, meeting all the conditions in the zoning ordinance. *Humble Oil* 284 N.C. at 467, 202 S.E.2d at 136. "Material evidence" has been recognized by this Court to mean "[e]vidence having some logical connection with the facts of consequence or issues." *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 676 (2017) (citing Black's Law Dictionary 638 (9th ed. 2009)). "Substantial evidence" has been defined to mean such relevant "evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

> It must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

*Humble Oil*, 284 N.C. at 471, 202 S.E.2d at 137 (citations and quotation marks omitted).

It is well established that:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.

*Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27 (citing *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136).

"[G]overnmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris Commc'ns v. City of Bessemer Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

Council members sitting in a quasi-judicial capacity must base their decision to grant or deny a CUP on objective factors, which are based upon the evidence presented, and not upon their subjective preferences or ideas. *See id.* "A city council may not deny a conditional use permit in their unguided discretion or because, in their view, it would adversely affect the public interest." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002). "[T]he denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the requested use." *Id.*

Petitioner is not seeking a rezoning, but rather a CUP to conduct a use that is expressly permitted in the CBD zoning district by the UDO. *See* Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1). The legislative and policy decision of whether to allow a hotel use in a CBD zoning district has already been made by the City Council in adopting the UDO ordinance. "A conditional use permit is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Woodhouse v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 211, 215, 261 S.E.2d 882, 886 (1980) (citation and quotation marks omitted).

Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted. *See Handy v. PPG Indus.*, 154 N.C. App. 311, 321, 571 S.E.2d 853, 860 (2002) ("Neutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes"). The property rights of CUP applicants must be respected and protected and the due process procedures must be followed.

A quasi-judicial hearing is a judicial proceeding and not a legislative function. *See Butterworth v. City of Asheville*, 247 N.C. App. 508, 511, 786 S.E.2d 101, 105 (2016) ("In making quasi-judicial decisions, the decision-maker must exercise discretion of a judicial nature." (citation and quotations omitted)). It is not an occasion to revisit the zoning or permitted uses of a property. Council members' personal or policy preferences are irrelevant and immaterial. *See Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 276, 533 S.E.2d 525, 530 (2000) ("speculative assertions or mere expression of opinion

about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body").

In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision. It is incumbent upon city and county attorneys to advise and inform decision-making boards of their proper roles and procedures required in quasi-judicial proceedings.

A. *Superior Court Applied the Correct Standard of Review*

**[1]** The City argues the superior court misapplied the standards of review in assessing the City's written decision to deny Petitioner a CUP. The City contends the superior court "expressly and erroneously applied *de novo* review in evaluating whether the evidence was 'sufficient' " based upon the court's conclusion 4:

> 4. Exercising de novo review, the Court concludes as a matter of law that the evidence presented by PHG and other supporting witnesses was competent, material and substantial and sufficient to establish a prima facie case of entitlement to a conditional use permit. In deciding otherwise, the Council made an error of law. A court reviews "de novo the initial issue of whether the evidence presented by a petitioner met the requirement of being competent, material, and substantial." *Blair Investments, LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013).

This conclusion 4, and the superior court's citation to this Court's decision in *Blair Investments*, clearly shows the superior court appropriately applied *de novo* review in determining whether Petitioner had presented "competent, material, and substantial" evidence to establish a *prima facie* case. When a petitioner meets its initial burden to present competent, material, and substantial evidence that it is entitled to a CUP, petitioner has established a *prima facie* case to issuance of the CUP. *See Am. Towers*, 222 N.C. App. at 641, 731 S.E.2d at 701 ("We must determine whether petitioner presented competent, material, and substantial evidence. If so, then petitioner has made out a *prima facie* case").

Presuming *arguendo*, the superior court correctly determined Petitioner's evidence was competent, material, and substantial, then Petitioner's evidence was necessarily "sufficient" to make out a *prima facie* case. *See id.* The superior court's order shows it did not weigh

evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence. The City's argument is overruled.

**[2]** The City also argues the superior court improperly made a *de novo* review of the evidence without applying whole record review to the City Council's 44 findings of fact. The City asserts Petitioner was required to specifically challenge the City Council's 44 findings of fact before the superior court. We disagree.

In *Little River*, the Lee County Board of Adjustment made 15 findings of fact to support its denial of the petitioner's requested special-use permit. __ N.C. App. __, 809 S.E.2d at 42. This Court determined the Petitioner had met its *prima facie* showing of entitlement to the SUP under *de novo* review. *Id.* at __, 809 S.E.2d at 52. Rather than specifically addressing each of the Board of Adjustment's findings of fact, this Court stated: "Many of the Board's findings of fact to support its conclusions are based solely upon opponents' evidence and wholly ignore the evidence presented to make a *prima facie* showing by Petitioner." *Id.* at __, 809 S.E.2d at 50.

This Court then held: "The Board's findings are unsupported by competent, material, and substantial evidence, and its conclusions thereon are, as a matter of law, erroneous. Respondent-Intervenors did not present substantial, material, and competent evidence to rebut Petitioner's *prima facie* showing of entitlement to a SUP." *Id.* at __, 809 S.E.2d at 51. Here, as in *Little River*, it was unnecessary for the superior court, and is unnecessary for this Court, to specifically address each of the City Council's 44 findings of fact, because no "competent, material, and substantial evidence" *contra* was presented to rebut Petitioner's *prima facie* showing. *Id.*

"[F]indings of fact are not necessary when the record sufficiently reveals the basis for the decision below or *when the material facts are undisputed and the case presents only an issue of law*." N.C. Gen. Stat. § 160A-393(l)(2) (2017) (emphasis supplied). The City Council's 44 findings of fact were unnecessary, improper, and irrelevant. No competent, material, and substantial evidence was presented to rebut Petitioner's *prima facie* case, and no conflicts in the evidence required the City Council to make findings to resolve any disputed issues of fact. *See Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27.

Under the terms of its own order, the City Council did not have to make 44 findings of fact to weigh or resolve conflicts in the evidence. The City Council made the initial legal determination Petitioner had failed

to present competent, material, and substantial evidence to establish a *prima facie* case of entitlement to a CUP. Once the City Council made this legal determination, it was unnecessary and erroneous to make 44 findings of fact on unchallenged evidence beyond the required ultimate findings on the 7 criteria specified by the UDO. Asheville, N.C., Code of Ordinances, § 7-16-2(c).

Additionally, once the superior court made the initial *de novo* determination that Petitioner had presented competent, material, and substantial evidence to establish a *prima facie* case, and no competent, material, and substantial evidence *contra* was presented in opposition or rebuttal to Petitioner's evidence, Petitioner was entitled to a CUP as a matter of law. *See Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27. Further, any purported whole record review by the superior court of the City Council's extraneous and superfluous 44 "findings of fact" would have been unnecessary.

The City's argument that Petitioner was required to assign specific error to any of the 44 extraneous and superfluous findings of fact is without merit. The City's argument the trial court misapplied its standards of review by not conducting whole record review of the City Council's unnecessary 44 findings of fact on unchallenged and unrebutted evidence is overruled.

B. *Preservation of Arguments*

**[3]** Before this Court, the City only argues Petitioner has failed to establish 3 of the 7 required criteria for issuance of a CUP under the UDO. These criteria are 3, 4, and 7. Asheville, N.C., Code of Ordinances, § 7-16-2(c). The City Council denied the requested CUP on the grounds Petitioner had failed to establish a *prima facie* case of entitlement to the CUP under criteria 1, 2, 3, 4, 5, and 7. The City has abandoned any arguments related to the superior court's conclusion of Petitioner's *prima facie* satisfaction of criteria 1, 2, 5 and 6. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). Petitioner's *prima facie* compliance with criteria 1, 2, 5 and 6 is unchallenged and established as a matter of law. *Id.*

C. *Criteria 3: Impact on Adjoining or Abutting Property*

**[4]** The City contends Petitioner has failed to meet its burden of establishing a *prima facie* case of entitlement to a CUP, because it has not presented material evidence. The City concedes Petitioner's expert testimony and reports were properly admitted without objection and this evidence was competent and substantial. "Material evidence" is defined

to mean "[e]vidence having some logical connection with the facts of consequence or the issues." *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676 (internal citation omitted).

The City argues the superior court erred by reversing the City Council's conclusion that Petitioner had failed to meet its burden of producing competent, material, and substantial evidence that the Project "will not substantially injure the value of adjoining or abutting property." Asheville, N.C., Code of Ordinances, § 7-16-2(c)(3).

The City contends Defendant's expert witness's uncontradicted testimony and report were not material, because the City Council found inadequacies in the methodologies employed by the expert. The City cites this Court's opinions in *American Towers* and *SBA v. City of Asheville City Council* to support its assertions that the City Council could determine Petitioner failed to establish a *prima facie* case under criteria 3 because of "perceived inadequacies" in Petitioner's expert's analysis. We disagree.

In *American Towers*, an applicant applied to the Town of Morrisville for a special use permit to erect a telecommunications tower. 222 N.C. App. at 642, 731 S.E.2d at 702. One of the criteria for obtaining a special use permit was "that the proposed development or use will not substantially injure the value of adjoining property." *Id.* At a hearing before the town board, the applicant offered the testimony and report of an appraiser, who had been admitted as an expert witness. *Id.* at 639, 731 S.E.2d at 700. No expert testimony was presented to rebut the applicant's expert appraiser. *Id.*

The town board denied the applicant's requested special use permit based, in part, upon the applicant's failure to establish a *prima facie* case that the tower "would not substantially injure the value of adjoining properties." *Id.* at 646, 731 S.E. 2d at 704. The superior court affirmed the town board's decision to deny the special use permit. *Id.* at 638, 731 S.E.2d at 700.

This Court affirmed the superior court's order upholding the town board's denial of the special use permit. *Id.* This Court recited the town board's reasons for concluding the applicant had failed to establish a *prima facie* case that the tower "would not substantially injure the value of adjoining properties[,]" as follows:

> 1) the report was not benchmarked against other developments or against the market in general, 2) in the two subdivisions studied by Mr. Smith the cell tower was in place

> before the neighboring homes were built. (as opposed to the case at hand here), 3) the report did not attempt to study the effect of possible devaluation of property, and 4) the report did not take into account any potential loss of value due to the loss of "curb appeal" with the tower rising above the adjoining residential neighborhood.

*Id.* at 645, 731 S.E.2d at 703.

This Court in *American Towers* summarized the Court's prior holding in SBA, as follows:

> This Court was faced with a virtually identical fact situation in the case of *SBA v. City of Asheville City Council*. 141 N.C. App. 19, 539 S.E.2d 18 (2000). In SBA, one of the bases for rejecting the application for a conditional use permit to erect a telecommunications tower was the failure of petitioner to establish a *prima facie* case that the value of adjoining properties would not be adversely affected. We noted that:
>
> > City Code § 7-16-2(c)(3) requires a showing that the value of properties adjoining or abutting the subject property would not be adversely affected by the proposed land use. The City's Staff Report submitted to respondent expressed concern that petitioners' Property Value Impact Study did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City. Petitioners' evidence was about other neighborhoods and other towers in the City. Their study did not even include information with respect to an existing cellular tower a short distance from the proposed site that potentially affected the same neighborhoods. Petitioners simply did not meet their burden of demonstrating the absence of harm to property adjoining or abutting the proposed tower as required by § 7-16-2(c)(3).
>
> *Id.* at 27, 539 S.E.2d at 23.
>
> Based upon the holding of *SBA*, respondent was permitted to find that petitioner failed to present a *prima facie* case based upon perceived inadequacies in the methodology of

> its expert. We are bound by this ruling. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

*Id.* at 645-46, 731 S.E.2d at 704.

Here, Petitioner presented the testimony and report of Tommy Crozier, who was tendered and admitted as an expert witness in land appraisal and valuation without objection. Crozier certified that his report was prepared in conformity with the "Uniform Standards of Professional Appraisal Practice" ("USPAP"). Crozier's oral testimony and report identified three properties, which directly adjoin or abut the property comprising the Project, and two properties located directly across the street. The adjoining and abutting properties are Carolina Apartments; First Church of Christ, Scientist; and the Asheville Broad Center. The properties across the street from the Project are a Hyatt Place hotel and an office building occupied by the Salvation Army. The report states in relevant part:

> The proposed hotel will consist of a new, ±$25M project located amidst 50+ year old structures that have historically been valued for tax purposes well below $3.0M. *The presence of the new hotel should meaningfully enhance the values of surrounding properties. This Principle of Progression has already materialized in the immediate area, evidenced by record high transaction prices since the nearby Hotel Indigo opened in 2009.* (emphasis supplied).
>
> . . .
>
> There have been numerous examples of property value enhancement as the result of revitalization (and as a result of new hotel development specifically) in comparable leisure markets like Charleston, Wilmington, Chattanooga, Savannah and Greenville, SC[.]

Crozier's report also contains an estimated value of $50.00 per square foot for the implied land values of the properties adjoining the Project. Crozier's estimate was based upon the sale prices for "vacant sites or improved sites acquired for redevelopment where the existing improvements were considered to have little to no contributory value." Crozier's report compares the $50.00 per square foot implied land values of the adjoining properties to the substantially lower assessed *ad valorem* values from the Buncombe County tax assessment conducted prior to Petitioner's purchase of the subject property located at 192 Haywood Street.

The City's reliance upon *SBA* and *American Towers* is misplaced. Neither of these Court's opinions in *SBA* nor *American Towers* contains any indication that the expert reports at issue in those cases were prepared in accordance with the applicable USPAP standards of the property appraisal licensure or other governing bodies. *See SBA*, 141 N.C. App. at 27, 539 S.E.2d at 18; *Am. Towers*, 222 N.C. App. at 645-46, 731 S.E.2d 698, 703-04.

Additionally, the expert reports in *SBA* and *American Towers* were immaterial to the issue of whether the telecommunications towers would adversely impact the value of adjoining property. The expert witness' report in *American Towers* was based upon an analysis of the values of adjoining properties built later than neighboring cell phone towers. *Am. Towers*, 222 N.C. App. at 645, 731 S.E.2d at 703 ("[I]n the two subdivisions studied by Mr. Smith the cell tower was in place before the neighboring homes were built.").

The expert witness' report in *SBA* "did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City." *SBA*, 141 N.C. App. at 27, 539 S.E.2d at 23. Unlike the report in *SBA*, Crozier's findings and conclusions specifically analyzes and addresses the values of properties adjoining, abutting, and neighboring the Project in Asheville.

Crozier certified that "[t]he reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics & Standards of Professional Appraisal Practice of the Appraisal Institute, which includes the Uniform Standards of Professional Appraisal Practice." No competent, material, and substantial expert evidence *contra* was presented at the hearing to show Crozier's analysis was unsound or utilized an improper methodology.

Any competent, material, and substantial evidence to rebut Crozier's admitted expert testimony and report would have to have been presented by an expert witness in land valuation. N.C. Gen. Stat. § 160A-393(k)(3)(a) (2017) ("The term 'competent evidence,' as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he use of property in a particular way would affect the value of other property"). The City Council's lay notion that Crozier's analysis is based upon an inadequate methodology does not constitute competent evidence under the statute to rebut his expert testimony and report. *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 678 ("Speculative and general lay opinions and bare or vague assertions do not constitute

competent evidence before the [decision-making body] to overcome the applicant's *prima facie* entitlement to the CUP").

Crozier's admitted and uncontroverted testimony and report meets the low threshold of being "material evidence" as his analysis has a "logical connection" to whether the Project "will impair the value of adjoining or abutting property." *Id.* at __, 801 S.E.2d at 676. Crozier's analyses and conclusions that: (1) adjoining and nearby property values in the neighborhood of the Project have increased since the Hotel Indigo opened in 2009; (2) values of neighboring properties in other markets have appreciated since the hotels were opened; and, (3) implied values of the adjoining properties have substantially increased since the neighboring Hyatt Hotel opened, all reinforce a "logical connection" to whether the Project will affect the value of "adjoining or abutting property." Crozier's report and testimony constitutes material, as well as competent and substantial, evidence to show *prima facie* compliance with criteria 3. The City's argument that Crozier's testimony and report are not "material" is contrary to the statute and controlling precedents, and is overruled.

D. *Criteria 4: Harmony with the Neighborhood*

**[5]** The City also argues Petitioner failed to present material evidence "[t]hat the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located." Asheville, N.C., Code of Ordinances, § 7-16-2(c)(4).

Under our binding precedents, "The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886. "[W]here a use is included as a conditional use in a particular zoning district, a *prima facie* case of harmony with the area is established." *Habitat for Humanity of Moore Cty., Inc. v. Bd. of Comm'rs*, 187 N.C. App. 764, 768, 653 S.E.2d 886, 888 (2007).

Here, the City does not dispute that a hotel is a permitted "use" in the CBD zoning district under the UDO. The City argues that even though the *use* of the subject property as a hotel in the CBD is a permitted use, the *development* of a hotel is not presumed to "be in harmony with the area." The statute, long-established precedents and the UDO contain no basis that "development" of a use is to be treated, analyzed, or distinguished from the "use" itself for purposes of criteria 4. Asheville, N.C., Code of Ordinances, § 7-16-2(c)(4) ("the proposed use or development . . . will be in harmony"); *see, e.g.*, *Petersilie v. Town of Boone Bd. of*

*Adjustment*, 94 N.C. App. 764, 767, 381 S.E.2d 349, 351 (1989) (using "use" and "development" interchangeably in discussing special-use permit ordinance similar to Asheville's UDO); *Habitat*, 187 N.C. App. at 768, 653 S.E.2d at 888 (treating "use" the same as "development" in applying presumption that use is in harmony with an area when it is included as a permitted use in the zoning district).

In addition, Petitioner presented the testimony of an expert witness, Blake Esselstyn. Esselstyn prepared a map showing the location of similar structures in the area compared to the proposed Project. He testified that the "scale, bulk and coverage" of the Project would be similar to a number of these similar structures. The density of the Project would be similar to the Carolina Apartments, Vanderbilt Apartments, and Battery Park Apartments located within the area of the Project. Esselstyn also testified that the contemporary architectural style of the Project would be harmonious with the area.

Petitioner's "use or development" of the property for the conditional use of a hotel in the permitted CBD zone establishes a *prima facie* case of harmony with the area. *Habitat*, 187 N.C. App. at 768, 653 S.E.2d at 888. Although the City asserts "use" should be distinguished from "development" in the UDO, Petitioner's expert witness, Esselstyn, established a *prima facie* case of harmony of the Project's use and development within the CBD area under criteria 4. The City's argument is overruled.

E. *Criteria 7: Undue Traffic Congestion or Traffic Hazard*

**[6]** The City also argues Petitioner failed to present material evidence to establish a *prima facie* case under criteria 7. Criteria 7 requires: "That the proposed use will not cause undue traffic congestion or create a traffic hazard." Asheville, N.C., Code of Ordinances, § 7-16-2(c)(7).

Petitioner presented the testimony and report of traffic engineer Kevin Dean, who was accepted and admitted as an expert witness without objection at the City Council hearing. Dean's report contains the data and results from a traffic analysis he conducted on the streets and intersections adjacent to the Project. Dean testified he had "coordinated with the City's traffic engineer, and [were] told that all we needed to provide was the trip generation table . . . as well as our anticipated distribution of those trips." Both the trip generation table and trip distributions were included in Dean's report.

Dean performed a "capacity analysis" and "collected peak hour traffic counts on [Thursday,] November 10th" 2016. Dean testified he performed the traffic analysis on a Thursday to accord with industry

standards, which specify traffic should be analyzed on days between Tuesday and Thursday.

Proposed traffic to and from the Project was estimated based upon industry standard data promulgated by "the Institute of Transportation Engineers." Dean's analysis showed the Project would increase the delays caused by traffic at nearby intersections by "five percent . . . or less." Dean testified that if his analysis had been performed on days when there was more traffic volume on the roads, the estimated traffic impact generated from the Project would impact a smaller percentage of overall traffic, due to higher traffic volumes at those intersections from sources other than the Project.

Dean's report indicates and concludes that "[w]ith the hotel in place, all of the study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay. Some of the intersections are expected to experience a reduction in overall delay. . . ." Additionally, Dean concluded "traffic entering the site should not conflict with traffic exiting the site."

Based upon his analysis, Dean testified to his professional opinion that the Project "will not cause undue traffic congestion or a hazard[.]"

Despite Dean's expert testimony, and the absence of any expert testimony to the contrary, the City Council found that Dean's analysis was deficient, in part, because: (1) Dean's traffic analysis only included data for November 10th and not for other times of the year; (2) Dean was not aware of whether environmental conditions could have affected traffic volumes; (3) Dean did not conduct his traffic analysis during the weekend; and (4) the traffic analysis "did not account for traffic that will be generated by future hotels and apartments in the downtown area. . . ."

The City Council also found Dean's analysis was deficient because a "sight distance check" was not conducted to determine if a "blind hill with limited visibility in the vicinity of the Hotel's parking deck's entrance and exit" would "endanger driver or pedestrian safety." This "finding" is apparently based upon a question posed by Charles Rawls, a lay member of the public, at the City Council hearing. Rawls questioned whether there was a potential sight distance problem for traffic coming over a purportedly blind hill near the Project's planned parking deck.

No competent, material, and substantial evidence was presented to refute Dean's traffic analysis. Dean testified his study was conducted in accordance with industry standards and used standard industry data

and methods. The speculations of lay members of the public and unsubstantiated opinions of City Council members do not constitute competent evidence *contra* under the statute or precedents to rebut Dean's traffic analysis. N.C. Gen. Stat. § 160A-393(k)(3)(b) (" 'competent evidence,' as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety"); *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 ("denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the requested use").

Dean's expert testimony and admitted report clearly constitute "material evidence" because they bear "a logical connection" to the issues of whether Petitioner's Project will impact traffic congestion or create a traffic hazard. *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676. Although lay members of the City Council may disagree with Petitioner's experts' testimony and reports, that does not rebut the legal determination of whether the evidence is "material." *See id.* at __, 801 S.E.2d at 675 ("Whether . . . material . . . evidence is present in the record is a conclusion of law." (citation omitted)). The City has failed to show that any of Petitioner's experts' testimony and evidence was incompetent, immaterial, unsubstantial, or rebutted by contrary evidence meeting the same statutory and precedential standards to deny the CUP. The City's arguments are overruled.

## V. Conclusion

Applying *de novo* review, the trial court properly concluded Petitioner had presented a *prima facie* showing of entitlement to a CUP to construct their hotel as a permitted use in the CBD zone. Petitioner satisfied its burden of production and, in the absence of competent, material, and substantial evidence to the contrary, is entitled to issuance of the CUP as a matter of law. *See Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27. The City Council's denial of the application was not based upon any competent, material, and substantial evidence *contra* to rebut the Petitioner's *prima facie* showing.

Once the superior court made the initial *de novo* determination that Petitioner had presented competent, material, and substantial evidence to establish a *prima facie* case, and no competent, material, and substantial evidence *contra* was presented in opposition or rebuttal to Petitioner's evidence, the superior court properly reversed and remanded for issuance of the CUP as a matter of law. *See id.* Further, any purported

whole record review by the superior court of the City Council's extraneous and superfluous 44 "findings of fact" was unnecessary.

The superior court's order reversing the City's denial of Petitioner's application and remanding for issuance of the CUP is affirmed. This cause is remanded to the superior court for further remand to the City to issue the CUP to Petitioner. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

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QUB STUDIOS, LLC AND ERIC ROBERT, PLAINTIFFS
v.
PHILLIP MARSH AND ASHLEY JENKINS, DEFENDANTS

No. COA18-205

Filed 6 November 2018

**1. Civil Procedure—Rule 60—jurisdiction—reference in complaint to exhibits—clerical error—not an error of law**

While it is true N.C.G.S. § 1A-1, Rule 60(b) is not designed for review of errors of law, plaintiffs' Rule 60 motion was premised on the initial complaint properly referencing only one of two exhibits. The error was clerical, not an error of law, and the trial court had jurisdiction to review the motion.

**2. Civil Procedure—Rule 60—lack of evidence or argument**

The trial court did not err by granting plaintiffs' motions under N.C.G.S. § 1A-1, Rule 60(b)(1) and (b)(6); defendant failed to show that plaintiffs' attorney erred in a negligent manner evincing a lack of due care, which would preclude Rule 60(b)(1) relief, and failed to present any argument regarding Rule 60(b)(6), the catch-all provision, thus abandoning that issue.

**3. Civil Procedure—motion to amend—relation back**

The trial court did not err by allowing an amendment to the complaint under N.C.G.S. § 1A-1, Rule 15(c) where the only difference between the original and the amended complaint was a reference to attached exhibits. The original complaint clearly gave notice of the subject matter to both defendants.

**4. Civil Procedure—Rule 60—relief from summary judgment—separate action—collateral attack**

The trial court did not err by denying defendant's Rule 60(b) motions for relief where the motions constituted an impermissible collateral attack on the original summary judgment which this action sought to enforce.

**5. Jurisdiction—subject matter—enforcement of prior judgment**

Subject matter jurisdiction was present where a complaint seeking enforcement of a prior judgment was proper and not challenged by defendant, the amended complaint related back, and the trial court had jurisdiction to consider plaintiffs' motion for relief.

**6. Pleadings—amended complaints—statute of limitations—relation back**

The trial court did not err by denying defendant's Rule 12(b)(6) motion to dismiss which was based on the argument that the amended complaint would have violated the statute of limitations. It was held elsewhere in the opinion that the amendment properly related back to the original complaint and complied with the statute of limitations.

**7. Jurisdiction—personal—motion to dismiss denied**

The trial court did not err by denying defendant's motion to dismiss for lack of personal jurisdiction where defendant offered general case law but no factual basis for the court lacking personal jurisdiction over him specifically. Moreover, this action was premised on a prior judgment to which defendant was a party and in which he participated.

**8. Pleadings—judgment on the pleadings—prior summary judgment order**

The trial court did not err by granting plaintiffs' motion for judgment on the pleadings in a matter based on a summary judgment in a prior proceeding. Defendant's assertions of affirmative defenses constituted impermissible collateral attacks on the summary judgment order in the prior action.

**9. Pleadings—judgment on the pleadings—judicial notice of prior action**

In an action based on a summary judgment in a prior action, the trial court's judicial notice of the prior proceeding did not convert the current proceeding for judgment on the pleadings into one for summary judgment.

**10. Judgments—on the pleadings—findings**

In a matter based on a summary judgment in prior matter, where there were motions to dismiss on multiple grounds, the trial court did not abuse its discretion by denying defendant's motion for written findings and conclusions on a motion for judgment on the pleadings. While it is appropriate for the trial court to enter findings and conclusions on Rule 60(b) motions, if the trial court had to determine facts, a judgment on the pleadings—a matter of law—would not have been appropriate.

Appeal by defendant from order and judgment entered 18 August 2017 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 3 October 2018.

*Roberson Haworth & Reese, P.L.L.C., by Christopher C. Finan and Shane T. Stutts, for plaintiff-appellees.*

*Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kara V. Bordman and Lyn K. Broom, for defendant-appellant Ashley Jenkins.*

CALABRIA, Judge.

Where plaintiffs' motion to reconsider was premised upon clerical error, and not an error of law, the trial court had jurisdiction to consider it. Where defendant does not challenge the trial court's decision to grant a motion for relief pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, such argument is abandoned and we find no error. Where plaintiffs' original complaint gave clear notice of the subject matter to defendants, and their amended complaint served only to properly reference a previously-attached exhibit, the trial court did not err in permitting the amended complaint to relate back to the original. Where defendant's motions for relief constituted an impermissible collateral attack, the trial court did not err in denying them. Where the trial court possessed subject matter jurisdiction, it did not err in denying defendant's motion to dismiss for lack of subject matter jurisdiction. Where plaintiffs' amended complaint related back to their original complaint, the trial court did not err in denying defendant's motion to dismiss for failure to state a claim.

Where defendant failed to offer any evidence that the trial court lacked personal jurisdiction over him, and in fact participated in the prior litigation in this matter, the trial court did not err in denying his

motion to dismiss for lack of personal jurisdiction. Where no material issues of fact remained to be resolved, the trial court did not err in granting plaintiffs' motion for judgment on the pleadings. Where the trial court entered judgment on the pleadings, the entry of findings of fact would have been inappropriate, and the trial court did not err in denying defendant's request for written findings of fact. We affirm.

## I. Factual and Procedural Background

On 20 June 2006, summary judgment was entered against Phillip Marsh ("Marsh") and Ashley Jenkins ("Jenkins") (collectively, "defendants"), in favor of QUB Studios, LLC ("QUB") and Eric Robert ("Robert") (collectively, "plaintiffs"). This judgment ordered defendants to pay damages to plaintiffs. On 8 June 2016, plaintiffs filed a complaint against defendants, alleging that defendants had failed to pay, and seeking treble damages plus attorney's fees. On 15 August 2016, the Clerk of Court entered default against Marsh for failure to plead.

On 19 September 2016, Jenkins filed his answer, denying the allegations in the complaint, and moving to dismiss pursuant to Rules 12(b)(1), (2), (4), and (6) of the North Carolina Rules of Civil Procedure, and pursuant to the statute of limitations. Jenkins further moved for relief from the original summary judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, and for a jury trial.

On 17 November 2016, plaintiffs moved for summary judgment. On 10 March 2017, the trial court granted summary judgment in favor of plaintiffs against Marsh, against whom default had been entered. That same day, in a separate order, the trial court held that plaintiffs' complaint failed to state a claim upon which relief could be granted with respect to Jenkins. It therefore granted Jenkins' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; denied plaintiffs' motion for summary judgment; and denied Jenkins' remaining motions.

On 22 March 2017, plaintiffs filed a motion to reconsider, seeking relief from judgment and to amend their complaint, alleging that Jenkins' motion to dismiss was successful due to "a mere technicality of pleading." On 17 April 2017, the trial court granted the motion, set aside its prior order, and allowed plaintiffs to amend their complaint. On 16 June 2017, plaintiffs moved for judgment on the pleadings. On 17 July 2017, Jenkins requested that the court make findings of fact and conclusions of law on each of its rulings on his motions, pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure.

On 18 August 2017, the trial court entered its order on plaintiffs' motion for judgment on the pleadings and Jenkins' motions to dismiss and for relief from judgment. The court denied Jenkins' motions, with prejudice, granted plaintiffs' motion for judgment on the pleadings, and awarded damages to plaintiffs. Jenkins appeals.

## II. Jurisdiction

In his first argument, Jenkins contends that the trial court lacked jurisdiction to consider plaintiffs' motion to reconsider and motion to amend. We disagree.

### A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

### B. Analysis

**[1]** Plaintiffs' motions for relief and reconsideration were filed pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, and premised upon "mistake, inadvertence, surprise, or excusable neglect." On appeal, however, Jenkins contends that the trial court lacked jurisdiction to consider these motions.

Jenkins contends, and we recognize, that "Rule 60(b) provides no specific relief for 'errors of law' and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for 'errors of law.' " *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). Jenkins argues that plaintiffs' motion, seeking "to correct an error of law[,]" was therefore not proper.

It is here that we must disagree with Jenkins. It is true that Rule 60(b) is not designed to review errors of law, and does not provide relief therefrom. But plaintiffs' motion was not premised upon an error of law. Plaintiffs' motion was premised upon the fact that their initial complaint included two exhibits, but only properly referenced one of them. The error plaintiffs cited was therefore not an error of law, but rather an error of the clerical variety.

Because plaintiffs' motion sought relief based upon plaintiffs' inadvertent clerical error, and not an error of law, relief pursuant to Rule 60(b) was appropriate. We therefore hold that the trial court possessed the jurisdiction to consider the motion.

III. Motions for Relief

In his second and third arguments, Jenkins contends that the trial court erred in granting plaintiffs' motion for relief, and in denying Jenkins' motions for relief. We disagree.

A. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

B. Plaintiffs' Motion to Reconsider

**[2]** Jenkins contends that plaintiffs "did not submit any evidence/facts to meet the requirements of Rule 60(b)(1) or (6) in order for the trial court to have a basis to grant [plaintiffs'] Rule 60 motion." Accordingly, Jenkins contends that the trial court erred in granting the motion.

Rule 60 of the North Carolina Rules of Civil Procedure governs motions for relief from a judgment or order. Specifically, Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C.R. Civ. P. 60(b). Jenkins contends, and we acknowledge, that although attorney error may constitute grounds for relief pursuant to Rule 60(b)(1), ignorance, carelessness, or similarly negligent mistakes evincing a lack of due care do not. *See Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). However, what is required is some showing that counsel not only erred, but did so in a negligent manner evincing a lack of due care. Jenkins offers nothing to support a contention that plaintiffs' counsel was negligent in its mistake.

If Jenkins made such a showing, however, that argument would apply only to plaintiffs' motion pursuant to Rule 60(b)(1). Jenkins makes no argument with respect to the motion pursuant to Rule 60(b)(6), the catch-all "any other reason" provision of the rule. Because Jenkins fails

to argue this, we deem such argument abandoned. *See* N.C.R. App. P. 28(b)(6) ("[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). In the absence of an argument that the trial court erred in granting plaintiffs' motion pursuant to the catch-all provision of Rule 60(b), we hold that the trial court did not err.

C. Plaintiffs' Motion to Amend

**[3]** Jenkins further contends that allowing the amendment of the complaint to relate back was prejudicial and erroneous. However, Rule 15(c) of the North Carolina Rules of Civil Procedure, which governs the relation back of amended pleadings, provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.C.R. Civ. P. 15(c).

In the instant case, the original complaint named each of the parties, the judgments, and the events central to plaintiffs' claim. The only difference between the original complaint and the complaint plaintiffs sought to introduce as amended was the reference, in the complaint itself, to the attached exhibits. Clearly, the complaint gave notice of the subject matter to both defendants, and Rule 15(c) permitted the amended complaint to relate back to the original. Again, we hold that the trial court did not err in permitting the complaint to relate back.

D. Jenkins' Motions for Relief

**[4]** In response to plaintiffs' complaint and amended complaint, Jenkins sought relief from the original summary judgment motion upon which the entire complaint was predicated, pursuant to multiple subsections of Rule 60(b). On appeal, Jenkins contends that the trial court erred in denying these motions for relief.

We note that, unlike plaintiffs' standalone Rule 60(b) motion, which clearly and in detail explained plaintiffs' position and reason for seeking relief, the Rule 60(b) motions found in Jenkins' answers are summary and lack any explanation or support. We further note that, on appeal, Jenkins addresses only his motions pursuant to Rule 60(b)(4) and (6). Since Jenkins raises no arguments with respect to his other Rule 60(b) motions, we deem such arguments abandoned. *See* N.C.R. App. P. 28(b)(6) ("[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

All this said, Jenkins' unsuccessful Rule 60(b) motions differ from plaintiffs' in one key detail. Plaintiffs' motion sought relief from a prior order in the instant case. Jenkins' motions, however, sought relief from an order in a separate case.

" 'A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.' " *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (quoting *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969)). "North Carolina does not allow collateral attacks on judgments." *Id.* (quoting *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003)). Jenkins' motions for relief in the instant case could not have been granted unless the judgment in the prior case was adjudicated invalid. Jenkins' motions, had they been made in the prior case, may have been appropriate, but here they constituted an impermissible collateral attack. Accordingly, we hold that the trial court did not err in denying Jenkins' Rule 60(b) motions.

## IV. Motions to Dismiss

In his fourth argument, Jenkins contends that the trial court erred in denying his motions to dismiss. We disagree.

### A. Standard of Review

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). With regard to Rule 12(b)(6), "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

### B. Analysis

Jenkins moved to dismiss the complaint pursuant to Rule 12(b)(1), governing subject matter jurisdiction; Rule 12(b)(2), governing personal jurisdiction; and Rule 12(b)(6), governing failure to state a claim. On

appeal, he contends that the trial court erred in denying his motions to dismiss.

**[5]** With respect to subject matter jurisdiction, we first note that the instant complaint, seeking enforcement of the prior judgment, was proper. Jenkins does not challenge it, and such challenge is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(6) ("[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). Moreover, as we have already discussed above, the trial court had jurisdiction to consider plaintiffs' motion for relief, and plaintiffs' amended complaint properly related back to the original. Accordingly, we hold that the trial court had subject matter jurisdiction, and did not err in denying Jenkins' motion to dismiss pursuant to Rule 12(b)(1).

**[6]** With respect to failure to state a claim, Jenkins contends that the amended complaint would have been dated 2017, more than the ten-year statute of limitations beyond the original 2006 order which plaintiffs sought enforced. Jenkins contends that the amended complaint does not relate back to the original, and thus fails to satisfy the statute of limitations on its face. Again, however, we have addressed this argument above. The amended complaint properly related back to the original complaint, and therefore complied with the necessary statute of limitations. We hold that the trial court therefore did not err in denying Jenkins' motion to dismiss pursuant to Rule 12(b)(6).

**[7]** Lastly, with respect to personal jurisdiction, Jenkins' argument is oddly conclusory. Jenkins cites North Carolina's two-prong analysis to determine whether a non-resident is subject to personal jurisdiction. Jenkins then cites the case of *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887 (1982), along with a brief summary of its facts. Jenkins then concludes, simply, that "[o]n these facts, our Court of Appeals concluded that there was no personal jurisdiction, . . . and there is none here with regard to Jenkins." Thus, although Jenkins offers case law concerning personal jurisdiction generally, he offers no factual basis as to why the trial court lacked personal jurisdiction over him specifically. Nor does he indicate any evidence in the record, nor can we find any, which may support this otherwise summary and unsubstantiated defense. Moreover, it cannot be overstated that this matter is premised upon a prior judgment which was entered in Guilford County, to which Jenkins was a party and in which Jenkins participated. As such, we hold that the trial court did not err in denying Jenkins' motion to dismiss pursuant to Rule 12(b)(2).

For all these reasons, we hold that the trial court did not err in denying Jenkins' motions to dismiss.

V. Judgment on the Pleadings

In his fifth argument, Jenkins contends that the trial court erred in granting plaintiffs' motion for judgment on the pleadings. We disagree.

A. Standard of Review

"This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008). "[A] motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

B. Analysis

**[8]** Jenkins contends that he "asserted affirmative defenses including assertions of fact which if taken as true, created fact issues to be decided by a jury." If this were true, it would have precluded the trial court from granting judgment on the pleadings. However, the examples Jenkins gives are various collateral attacks on the original summary judgment order. As we stated above, these collateral attacks are impermissible. Notwithstanding Jenkins' contentions to the contrary, it is undisputed that summary judgment was entered against Jenkins and Marsh in the prior proceeding.

**[9]** Jenkins additionally contends that the trial court "took judicial notice of the entire contents of the court file for the 2006 matter which converted the motion to one for summary judgment." Jenkins contends that the trial court erred in doing so.

Although there is not significant case law on point within our jurisdiction, we note that the Supreme Court of the United States has addressed this issue unambiguously, stating that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 168 L. Ed. 2d 179, 193 (2007). We find this reasoning persuasive, and agree. The distinction between a Rule 12(c) motion for judgment on the pleadings and a Rule 56 motion for summary judgment is that the latter may require an evidentiary hearing. In

the situation where the trial court takes judicial notice of an established fact – such as the record of the prior proceeding – no hearing is required. As such, the trial court did not convert the proceeding into one for summary judgment by taking judicial notice.

Jenkins presents no other purported issues of fact which might preclude a judgment on the pleadings. Accordingly, we hold that the trial court did not err in granting plaintiffs' motion for judgment on the pleadings.

## VI. Request for Findings

In his sixth argument, Jenkins contends that the trial court erred in denying his request for findings of fact. We disagree.

### A. Standard of Review

"Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party." *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993) (citing N.C.R. Civ. P. 52(a)(2)).

### B. Analysis

**[10]** Prior to the entry of the trial court's written order, Jenkins filed a motion pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure, requesting that the trial court enter findings of fact and conclusions of law when entering its written order. The trial court denied this motion. On appeal, Jenkins contends that this was error.

Jenkins notes, and we agree, that it is appropriate for the trial court to enter findings of fact and conclusions of law when ruling on motions for relief pursuant to Rule 60(b). *See Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (2000). In such a circumstance, it would be appropriate for a party to actively request such findings and conclusions pursuant to Rule 52(a).

However, this Court has noted that, where judgment is appropriate as a matter of law, the entry of findings of fact is contraindicated. For example, this Court has held that "Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper." *Stone v. Conder*, 46 N.C. App. 190, 195, 264 S.E.2d 760, 763 (1980). In that same case, this Court held that "[i]n determining a motion for summary judgment, the trial judge is not required to make finding [sic] of fact and conclusions of law and *when he does make same, they are disregarded on appeal*." *Id.* (emphasis added, citation and quotation marks omitted).

In the instant case, the matter was decided on the pleadings pursuant to Rule 12(c) – that is, as a matter of law. Findings of fact were not necessary for the trial court to reach its determination. Rather, if the trial court had to determine facts, judgment on the pleadings would not have been appropriate. *Id.* Accordingly, we hold that the trial court did not abuse its discretion in denying Jenkins' motion for written findings of fact and conclusions of law.

## VII. Conclusion

We hold that the trial court possessed subject matter jurisdiction to hear this case. The trial court did not err in granting plaintiffs' Rule 60 motion, nor in denying Jenkins'. The trial court did not err in denying Jenkins' motions to dismiss. The trial court did not err in granting judgment on the pleadings in favor of plaintiffs. Because judgment on the pleadings is a judgment as a matter of law, findings of fact would have been inappropriate, and the trial court did not err in denying Jenkins' motion for written findings of fact.

AFFIRMED.

Judges TYSON and ZACHARY concur.

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TERESSA B. ROUSE, PETITIONER
v.
FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA17-884

Filed 6 November 2018

**1. Public Officers and Employees—career employees—dismissal—procedural due process—notice of potential punishment**

A county department of social services (DSS) violated a career DSS employee's procedural due process rights by failing to provide her with sufficient notice of the potential punishment to be determined during a pre-disciplinary conference and then subsequently dismissing her. The notice stated that the punishment being considered was dismissal from the Family and Children's *Division* of the county DSS agency, while the actual punishment being considered was dismissal from the county DSS agency.

**2. Public Officers and Employees—career employees—dismissal —just cause—grossly inefficient job performance**

An administrative law judge's findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of grossly inefficient job performance. The employee performed her job according to the directions given by her management group during the incident that gave rise to her dismissal.

**3. Public Officers and Employees—career employees—dismissal —just cause—unacceptable personal conduct**

An administrative law judge's findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of unacceptable personal conduct. There was no just cause for dismissal where the employee had a long, discipline-free career with respondent-employer, had a record of good job performance, and performed her job as directed by her management group.

**4. Public Officers and Employees—career employees—wrongful termination—back pay—attorney fees**

An administrative law judge lacked authority to award back pay and attorney fees to a career local social services employee who had been wrongfully terminated from employment.

Appeal by respondent from final decision entered 18 April 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 20 March 2018.

*Elliot Morgan Parsonage, PLLC, by Benjamin P. Winikoff, for petitioner-appellee.*

*Office of Forsyth County Attorney, by Assistant County Attorney Gloria L. Woods, for respondent-appellant.*

BRYANT, Judge.

Where the record provided substantial evidence to support the trial court's findings of fact and the conclusions of law, we affirm the Administrative Law Judge's (ALJ) final decision. Where the ALJ lacked

authority to award back pay and attorney's fees, we vacate the portion of the final decision to award back pay and attorney's fees.

Petitioner Teressa B. Rouse was employed by respondent Forsyth County Department of Social Services. She began her employment on 21 January 1997. In 2001, she was promoted to the position of Social Worker. By 2011, she had been promoted to a Senior Social Worker and began working in the respondent's Family and Children's Division After Hours Unit. As a Senior Social Worker, petitioner's duties included receiving and screening reports for abuse, neglect, and dependency. Since 2000, she had consistently received review ratings that her work "exceeded expectations." And prior to the event that gave rise to the underlying action, "[p]etitioner had no prior disciplinary action in her record." During her nineteen years of employment, there is no indication that respondent ever accused petitioner of failing to make a report. In her most recent employee evaluation, petitioner's supervisor wrote that petitioner had a "strong knowledge base" and a "grasp of afterhours protocols and guidelines."

Part of respondent's protocols called for social workers to utilize computer-generated "CPS reports" created by the State to guide a social worker through a "decision tree" to recommend if the information received should be "screened in" for an investigation or "screened out" if no investigation was required. The State provided training on how to generate the reports and protocols and directed that every report that was "screened out ha[d] second and third levels of review to make sure that the screening was accurate." In addition to the State-required screen in and screen out options, respondent instituted a third option—"supportive counseling." The protocol for "supportive counseling" was not reduced to writing, and respondent provided no formal training on the procedure. Some social workers called supportive counseling "a 'usual practice' of not making a report if there is no abuse, neglect, or dependency. . . . Other workers called it the 'after hours protocol' when a social worker decide[d] not to document a call in any way."

> Victor Isley, Division Director for [respondent's] Family and Children Services, testified that the county chose to implement this practice, because they "don't want to be off base with their screen out percentages" by including "*general inquiry calls*" in the CPS online assessment tools. . . . This is because the percent of cases "screened out" is collected and shared with the State; having every call put in to a CPS report would "skew" their data.

(emphasis added). However, respondent provided no formal training on how to distinguish a general inquiry from a non-general inquiry, and no second or third level of review was made following a determination that a call was a non-general inquiry call.

On 20 June 2018, petitioner was working an after-hours shift when she was assigned a walk-in appointment made by a homeless man (the father) seeking temporary housing for his twelve year old son (the son). Petitioner engaged the father about potential family members and natural supports with whom the son could stay. The man stated that he had tried to communicate with the son's mother (the mother) but communication between them was difficult. Petitioner allowed the father to use her phone to contact the mother. During the ensuing conversation father and mother began to argue before petitioner interjected, introduced herself, and explained to the mother that the father and the son had come to respondent seeking a temporary residence for the son.

The mother became irate complaining about the father and listing several reasons why she did not want her son. Petitioner asked the mother for a specific reason why the son could not stay with her. As petitioner explained the foster care process, which the mother said she didn't want on her record, she then blurted out, "Oh, yeah. He molested my daughters." Petitioner immediately followed up with questions she had been trained to ask: "Who is he?" "My son," the mother responded. "Are you telling me that he molested your daughters?" "I didn't say that," the mother responded. "Well, did you call law enforcement? Did you make a report?" "No, I didn't say that," the mother responded. "I didn't say he molested my daughters, I said he had tendencies." Petitioner questioned both the father and the son, and each denied the allegations.

In seeking to find housing for the son, petitioner gave no credibility to the mother's statement that the son molested her daughters, as the mother had immediately retracted the statement. Petitioner counseled the mother telling her that she "[could not] go around and you should not go around saying these things, kind of things, especially if it didn't happen, because you can get some people in trouble."

Ultimately, it was agreed the son would spend the night with his paternal grandmother and, thereafter, stay with his mother. At the end of her after-hours shift, an email was sent informing respondent of petitioner's efforts on behalf of the father and the son, and that petitioner had provided supportive counseling to the walk-in appointment.

In mid-July 2016, respondent received a request for assistance from Wilkes' County DSS (WCDSS) regarding an allegation of child-on-child

sexual misconduct. The victim's family was the same family with whom petitioner had spoken on 20 and 21 June. On 26 July, a meeting was held between petitioner, respondent's Family and Children Division Director Victor Isler, Program Manager Linda Alexander, and petitioner's supervisor, Alicia Weaver, to discuss petitioner's interactions with the mother, the father, and the son.

At the end of the meeting, Division Director Isler informed petitioner that she would not go to work that night and that she would be reassigned to the day shift. There would be an internal investigation. By letter, petitioner was informed that she was being reassigned due to an internal investigation and that the reassignment was effective until 29 August 2016.

On 12 September, petitioner received a "preconference document" informing her of a conference on 15 September 2016 to discuss dismissing her from her Senior Social Worker position within respondent's Family and Children Services Division. On 15 September 2016, petitioner met with the agency director who informed petitioner that the recommendation was for dismissal from respondent's agency, not simply the division of Family and Children Services. On 22 September 2016, petitioner received a formal dismissal letter from the agency.

On 21 October 2016, petitioner filed a petition for a formal case hearing with the Office of Administrative Hearings contending that she was discharged without just cause. A hearing on the matter was commenced on 21 January 2017 in the Guilford County Courthouse before the Honorable J. Randall May, ALJ presiding. On 18 April 2017, ALJ May filed a final decision concluding that respondent substantially prejudiced petitioner's rights, failed to act as required by law, and acted arbitrarily and capriciously when dismissing petitioner. ALJ May ordered that petitioner be reinstated to her position as Senior Social Worker, or a comparable position, with all applicable back pay and benefits. In addition, respondent was ordered to pay petitioner's attorney fees. Respondent appeals.

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On appeal, respondent challenges the 18 April 2017 final decision arguing that the ALJ erred by concluding respondent failed to establish grossly inefficient job performance, failed to establish unacceptable personal conduct, and violated petitioner's procedural rights. Respondent raises five issues on appeal: whether the ALJ erred by (I) concluding that respondent lacked just cause to dismiss petitioner; (II) concluding that respondent violated petitioner's procedural rights; (III) making unsupported findings of fact; (IV) making unsupported conclusions

of law; and (V) concluding that petitioner was entitled to an award of attorney's fees.

*Standard of Review*

Respondent appeals from the final decision of an ALJ who reviewed a final agency decision issued in accordance with the North Carolina Human Resources Act and the Administrative Procedures Act. N.C. Gen. Stat. §§ 126-34.02, 150B-34 (2017). Now on appeal before this Court, review is governed by General Statutes, section 150B-51:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b), (c) (2017).

*I*

**[1]** Respondent contends that the ALJ erred as a matter of law by concluding that respondent violated petitioner's procedural rights. We disagree.

"Procedural due process restricts governmental actions and decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (citation omitted). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citation omitted).

"The North Carolina General Assembly created, by enactment of the . . . [North Carolina Human Resources Act], a constitutionally protected 'property' interest in the continued employment of career State employees." *Id.* at 321, 507 S.E.2d at 277; *see generally* N.C. Gen. Stat. § 126-35(a) (2017) ("No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."). Our General Assembly also provided that the provisions of the State's Human Resources Act, codified in General Statutes, Chapter 126, "shall apply to: . . . (2) All employees of the following local entities: . . . b. Local social services departments." N.C. Gen. Stat. § 126-5(a)(2)b. (2017)[1]; *see also Watlington v. Dep't of Soc. Servs. Rockingham Cty.*, ___ N.C. App. ___, ___, 799 S.E.2d 396, 401 (2017) ("The [State Human Resources Act] applies to . . . certain local government employees, including those who work for local social services departments."); *Early v. Cty. of Durham DSS*, 172 N.C. App. 344, 354, 616 S.E.2d 553, 560 (2005) ("[T]his Court has also held broadly: Local government employees . . . are subject to the . . . [Human Resources Act]. As such, they cannot be 'discharged, suspended, or demoted for disciplinary reasons, except for just cause.' G.S. § 126–35." (citation omitted)).

It is well settled that a career State employee enjoys a "property interest of continued employment created by state law and protected by

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1.

> For the purposes of [General Statutes, Chapter 126], unless the context clearly indicates otherwise, "career State employee" means a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:
>
> (1) Is in a permanent position with a permanent appointment, and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.

N.C. Gen. Stat. § 126-1.1(a) (2017).

the Due Process Clause of the United States Constitution. As a consequence, respondent could not rightfully take away this interest without first complying with appropriate procedural safeguards." *Nix v. Dep't of Admin.*, 106 N.C. App. 664, 666, 417 S.E.2d 823, 825 (1992) (citations omitted). This applies equally to local career DSS employees, such as petitioner. *See* N.C.G.S. § 126-5(a)(2)b.; *Early*, 172 N.C. App. at 354, 616 S.E.2d at 560.

Pursuant to our Administrative Code,

> [b]efore an employee may be dismissed, an agency must comply with the following procedural requirements:
>
> . . . .
>
> (d) The agency director or designated management representative shall conduct a pre-dismissal conference with the employee . . . . The purpose of the pre-dismissal conference is to review the recommendation for dismissal with the affected employee and to listen to and to consider any information put forth by the employee, in order to insure that a dismissal decision is sound and not based on misinformation or mistake.

25 N.C. Admin. Code 01I .2308(4)(d) (2018).

Respondent challenges four findings of fact and nine conclusions of law. We focus first on conclusion of law number 74 stating that respondent violated petitioner's procedural due process rights by, *inter alia*, failing to properly notify petitioner of the punishment to be determined by the pre-disciplinary conference.

As set out in Issue II below, on 12 September 2016, petitioner was handed a written statement notifying her of a pre-disciplinary conference scheduled for 15 September 2016. Petitioner was advised that the basis of the pre-disciplinary conference was unacceptable personal conduct and grossly inefficient job performance. Per the written statement, "[t]he purpose of the conference is to discuss the recommendation of the [respondent] [to] dismiss you from the position of Senior Social Worker with the *Family and Children's Division* of [respondent]." (emphasis added). Petitioner sought to contact Agency Director Donahue and her county human resources office representative, but was denied a meeting with both. Petitioner testified to her understanding that the pre-disciplinary conference was to discuss her dismissal from respondent's Family and Children's Division; however, during the pre-disciplinary conference she was informed that the conference was

to discuss her dismissal from the respondent's *agency.* As the ALJ found in the final decision, the following statements were made during the pre-disciplinary conference:

> 73. . . . I know [respondent] recommended dismissal of me from the division; really I am ok with that; I have spoken with you [Debra Donahue] regarding other interests that I have in the agency, I just want to use my services to make a difference in the agency/community.
>
> 74. [Agency Director] Donahue responded, "Let me give you clarity regarding the recommendation; the recommendation is to dismiss you from the agency, not the Division."
>
> 75. Petitioner responded,
>
> "Thank you for the clarity, I thought it was dismissal from the Division; in 19 years, I have never had a written warning, I am floored, almost speechless; it really bothers me that people think I would intentionally harm or place a child in harm[']s way; I have always followed the letter of the law when it comes to child welfare, I have never taken a shortcut, never a written warning, I'm just taken aback."

Thereafter, petitioner received no further written notice or opportunity to be heard in a pre-disciplinary conference, as to dismissal from respondent, as opposed to a division of respondent. On 22 September 2016, petitioner received her dismissal letter which stated that "you are dismissed from your position as a Senior Social Worker with [*respondent*]."

As dismissal from a division within an agency and dismissal from the agency are different punishments, respondent failed to provide petitioner with sufficient notice of the potential punishment to be determined during the pre-disciplinary conference. Reasonable notice of dismissal encompasses notice of sanctions or from what employment the accused may be dismissed. *See Peace*, 349 N.C. at 322, 507 S.E.2d at 278 ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard." (citation omitted)). We uphold the ALJ's conclusion that respondent's lack of notice violated petitioner's procedural due process rights. Accordingly, respondent's argument on this point is overruled.

Having determined petitioner's due process right to notice and opportunity to be heard have been violated, we need not address whether prolonging her investigatory period without authorization was a violation of petitioner's due process rights.

*II & III*

**[2]** Respondent argues that the ALJ erred by concluding that respondent failed to establish just cause for petitioner's dismissal due to grossly inefficient job performance. Respondent challenges several of the findings of fact as unsupported by substantial evidence and conclusions of law as unsupported by the findings of fact.

Pursuant to our General Statutes, "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause." N.C. Gen. Stat. § 126-35(a) (2017). Pursuant to the North Carolina Administrative Code, Title 25 ("Office of State Human Resources") (previously codified within our General Statutes, Chapter 126), the two bases for "the discipline or dismissal of employees under the statutory standard of 'just cause' as set out in G.S. 126-35 [include] . . [d]iscipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance." 25 N.C. Admin. Code 1I.2301(c)(1) (2018) (Just Cause for Disciplinary Action).

> Gross Inefficiency (Grossly Inefficient Job Performance) occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in:
>
> (1) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public or to a person(s) over whom the employee has responsibility; or
>
> (2) the loss of or damage to agency property or funds that result in a serious impact on the agency or work unit.

25 N.C. Admin. Code 01I.2303(a).

This Court has held that to determine if just cause exists to dismiss an employee for grossly inefficient job performance "the [agency]

must prove that (1) the employee failed to perform his job satisfactorily and (2) that failure resulted in the potential for death or serious bodily injury." *Donoghue v. N.C. Dep't of Corr.*, 166 N.C. App. 612, 616, 603 S.E.2d 360, 363 (2004) (citation omitted).

On appeal, respondent contends that because petitioner failed to generate a formal or informal, handwritten or computerized CPS report following the interview with the father, the son, and the mother, she created the potential for serious harm to a family in violation of General Statutes, section 7B-301(a),[2] the North Carolina Child Abuse Reporting Law.

Respondent challenges several (A) findings of fact and (B) conclusions of law on the topic of grossly inefficient job performance.

*A.*

Respondent specifically challenges the following findings of fact:

> 44. Petitioner treated this as a "general inquiry" about foster care, because none of the parties wished to make a report and she had *no independent cause* to suspect that child abuse had occurred.
>
> 46. On or about mid July 2016, Respondent received a request for assistance from Wilkes County Department of Social Services regarding an allegation of child on child sexual misconduct because the mother was not cooperating; and the father stated that none of it was true and wanted to work with the social worker that he had met in Forsyth County. . . .
>
> 47. On July 26, 2016, a meeting was held with Petitioner, Victor Isler; Program Manager, Linda Alexander; and Petitioner's supervisor, Alicia Weaver. During this meeting, it was discovered that this family was the same family that Petitioner had interacted with on June 20, 2016. . . . .
>
> 48. Petitioner was honest and forthcoming . . . . She also informed that she had received a phone call from the attorney of the mother threatening Petitioner and the father

2. "Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found." N.C. Gen. Stat. § 7B-301(a) (2017).

> because the mother was not letting him visit her son in [sic] the previous week.

(emphasis added).

Petitioner's testimony—as set forth in other unchallenged findings of fact—support finding of fact number 44 that she had no cause to suspect abuse. For instance, petitioner first spoke with the mother during an "aggressive" conversation between the mother and the father after the father had brought the son into respondent's agency seeking a temporary residence for him. As petitioner was exploring alternative options to foster care placement, the mother gave the following reasons why she did not want the son to live with her:

> - That she is now married
> - That her two daughters do not acknowledge the father as their father
> - That she wanted her new husband to adopt their daughters
> - That the father's other relatives should take care of the son
> - That the father was verbally and physically abusive
> - That the son called her a crack whore when he was six
> - That she is in nursing school and had a busy schedule
> - That she had no room for her son

When informed that none of those reasons indicated why her son could not come live with her, the mother continued to express her strong dislike for the father. When asked if the mother wanted the son to be placed in foster care, the mother responded, "Well, I don't want that, I don't want that on my record." At a later point, "the mother blurted out, 'Oh, yeah. He molested my daughters.' "

> 35. Petitioner immediately launched into her trained follow up questions. Petitioner asked, "Well, who is he?" and the mother said, "My son". [sic] Petitioner asked for clarification, "Are you telling me that he molested your daughters?" The mother immediately recanted and stated, "I didn't say that." Petitioner then asked the mother, "Well, did you call law enforcement? Did you make a report?" The mother continued to deny, "No. I didn't say that." The mother then said, "I didn't say he molested my daughters, I said he had tendencies." . . . .

> 36. Petitioner questioned both the father and the son, and asked if this was true; the father and son each denied the allegation. . . . .
>
> . . . .
>
> 45. The next day, the mother, the father, and the grandmother informed Petitioner that the mother was taking the son and that the issue was resolved.

Even during the hearing on respondent's disciplinary action of terminating petitioner, the ALJ found that "the mother testified at the hearing, under oath, that she never stated to Petitioner that her son had molested her daughters. . . ."

The record provides substantial evidence in support of the ALJ's finding of fact number 44, "[p]etitioner . . . had no independent cause to suspect . . . child abuse[, neglect, or dependency]."

In finding of fact number 46, respondent contends that WCDSS contacted respondent because of allegations of sexual activity prior to respondent's facilitation of the son's placement with the mother and her daughters. Respondent's contention is without merit.

On the contrary, the finding of fact shows that WCDSS requested assistance from respondent as petitioner had previously been involved with the family. This finding is supported in part by the mother's testimony where she denies saying her son had sexually molested his siblings. When asked, she responded:

> Absolutely not. Where that came from I have no idea. If at any time I have thought he would have molested my daughters or had have, regardless of how old he was, I would have done then what I did on June -- July 16th and had my daughters at Brenner's Hospital, the Wilkes County Sheriff's Department at my house, as well as Wilkes County DSS.

Finding of fact 42 is related to finding of fact 46 and is supported by testimony in the record from at least two witnesses.

While respondent urges there is contrary testimony as to finding of fact number 48, it is clear from petitioner's testimony concerning her telephone call, that there is substantial evidence to support this finding by the ALJ.

B.

Respondent next challenges portions of the ALJ's conclusions of law related to respondent's claims of grossly inefficient job performance.

> 30. . . . With respect to the policy violations cited, the weight of the evidence fails to show Petitioner's violation of the policies named by Respondent in the dismissal letter.
>
> 31. The greater weight of the evidence does not establish a violation of N.C.G.S. § 7B-301. N.C.G.S. § 7B-301 makes it a class 1 misdemeanor to knowingly or wantonly fail to report the case of a juvenile, when that person has cause to suspect that any juvenile is abused, neglected, or dependent. The North Carolina Courts have not defined "cause to suspect;" [sic] however, the North Carolina School of Government provides:
>
> > The standard is not just a suspicion but cause to suspect. However, a person deciding whether to make a report also must consider a child's statements, appearance, or behavior (or other objective indicators) in light of the context; the person's experience; and other available information." Janet Mason, Reporting Child Abuse and Neglect in North Carolina 67 (3d ed. 2013), available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/full_text_books/Mason_%20Reporting-Child-Abuse_complete.pdf.
>
> Petitioner was the only person to provide first-hand testimony of what she heard and observed that day. Petitioner testified extensively, and throughout Respondent's investigation, that based on the context of the statements, her experience, and ability to observe and interact with the child, she had no cause to suspect abuse. It is Respondent's burden to prove that Petitioner had cause to suspect abuse and knowingly chose not to report the abuse. This was not established by the greater weight of evidence.
>
> 32. The greater weight of evidence does not establish a violation of 10A N.C.A.C. 70A .0105, which dictates that

> the "county director shall receive and initiate an investigation on all reports of suspected child abuse, neglect, or dependency, including anonymous reports."
>
> 33. Petitioner never admitted that she violated 10A N.C.A.C. 70A .0105(a); instead, she remained adamant that she followed Respondent's "supportive counseling policy." Nowhere in 10A N.C.A.C. 70A .0105(a) does it state that Petitioner must inform her supervisor of all facts when providing supportive counseling and must generate a FDCSS report for all intakes.
>
> 35. The majority of the credible evidence presented indicated that Petitioner may have violated Respondent's "supportive counseling policy." However, Respondent did not list that as a basis for Petitioner's dismissal, and it is not addressed here.
>
> 36. Even if Respondent had presented sufficient evidence that Petitioner failed to satisfactorily perform job requirements, the grossly inefficient job performance claim fails because Respondent was required to make an evidentiary connection between Petitioner's actions and the harm. Respondent failed to do this. See Clark v. N.C. Dep't of Pub. Safety, No. COA15-624, 2016 N.C. App. LEXIS 897 (Ct. App. Sep[t]. 6, 2016)[.]

As to conclusions of law numbered 30, 31, 32, and 33, respondent generally argues that petitioner failed to create a report in compliance with State policy that would have initiated a second level of review and allowed petitioner's supervisor to make a determination of whether the information gathered during the initial intake meeting with the father and the son constituted abuse, neglect, or dependency, or warranted further investigation.

As set forth in the final decision, our Administrative Code sets out that

> Gross Inefficiency (Grossly Inefficient Job Performance) occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in:
>
> (1) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public

or to a person(s) over whom the employee has responsibility; or

(2) the loss of or damage to agency property or funds that result in a serious impact on the agency or work unit.

25 N.C. Admin. Code 01I.2303(a).

As the ALJ concluded, petitioner had performed the job requirements as directed by the management group for the agency for which she worked. The substantial evidence and findings of fact indicate that petitioner provided supportive counseling to the father and the son on 20 and 21 June 2016 and notified her supervisor of the counseling provided during her work shift. Supportive counseling was not included in the State's intake CPS reporting mechanism, but was a practice utilized by respondent's management.

Moreover, in the ALJ's unchallenged findings of fact, during the investigation of petitioner's 20 June 2016 incident, petitioner's supervisor, Stanfield, was not asked to provide a written account of what he recalled, and he was not provided with a written copy of petitioner's statement of the events on that date.

As the substantial evidence and findings of fact indicate that petitioner provided supportive counseling to the father, the mother, and the son on 20 June 2016, that supportive counseling was not a stated ground for petitioner's dismissal, and because petitioner's supervisor failed to indicate what information he had received, the ALJ concluded that petitioner's dismissal could not be upheld on the ground of grossly inefficient job performance. We agree and overrule respondent's challenge to conclusions of law 30, 31, 32, 33, and 35.

Respondent lists conclusion of law number 36 ("Respondent was required to make an evidentiary connection between Petitioner's actions and the harm. Respondent failed to do this.") as one challenged on appeal, but does not otherwise specifically address this conclusion in its brief before this Court. *See* N.C. R. App. P. 28(a) (2018) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We note that we overruled respondent's challenge to finding of fact number 44 ("Petitioner . . . had no independent cause to suspect . . . child abuse[, neglect, or dependency].") under subsection A, *supra*. Therefore, we dismiss respondent's challenge to this conclusion of law.

Accordingly, we overrule or dismiss respondent's challenges to the ALJ's findings of fact and conclusions of law addressing grossly inefficient job performance.

*IV*

**[3]** Next, respondent argues that the ALJ erred by concluding that respondent failed to establish just cause for dismissal based on unacceptable personal conduct.

Our Administrative Code provides that "[e]mployees may be dismissed for a current incident of unacceptable personal conduct." 25 N.C. Admin. Code 01I .2304(a) (2018) (Dismissed for Personal Conduct). Unacceptable personal conduct is defined in pertinent part as:

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> (2) job related conduct which constitutes violation of state or federal law; or
>
> . . . .
>
> (4) the willful violation of known or written work rules; or
>
> (5) conduct unbecoming an employee that is detrimental to the agency's service[.]

25 N.C. Admin. Code 01I .2304(b)(1), (2), (4), and (5).

Using the test for determining just cause for discipline due to unacceptable personal conduct as presented in *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), the ALJ stated

> (a) did the employee engage in the conduct the employer alleges;
>
> (b) does the employee's conduct fall within one of the categories of unacceptable conduct provided in the Administrative Code; and
>
> (c) if the employee's actions amount to unacceptable personal conduct, did the misconduct amount to just cause for the disciplinary action taken? Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

*See generally id.* at 381, 726 S.E.2d at 924–25.

Respondent alleges unacceptable personal conduct under sections (1), (2), (4), and (5). After extensive review, the ALJ determined respondent did not have just cause to dismiss petitioner for unacceptable

personal conduct. On appeal, respondent challenges six of the ALJ's findings of fact (16, 17, 18, 24, 42, and 43) and nine conclusions of law (44, 45, 48, 49, 50, 51, 54, 55, and 56). We address primarily the findings of fact and conclusions of law related to part (c) of the *Warren* test ("[D]id the misconduct amount to just cause for the disciplinary action taken?").

In the final decision, under the heading "Did Petitioner engage in the conduct as alleged?" the ALJ concluded

> the preponderance of the evidence shows that Petitioner engage[d] in the conduct alleged by Respondent. While there is some evidence to the contrary . . . the greater weight of evidence demonstrates that Petitioner did not inform her supervisor of the allegations of child on child sexual abuse and did not create a FCDSS Computerized Report.

However, the ALJ further concluded that "[e]ven if Petitioner's action(s) were, at some level, considered to be some type of unacceptable personal conduct, Petitioner's actions did not constitute just cause for dismissal when the equities in this case are balanced." The ALJ made the following conclusions:

> 51. Even if Petitioner's action(s) were, at some level, considered to be some type of unacceptable personal conduct, Petitioner's actions did not constitute just cause for dismissal when the equities in this case are balanced. Those include the following: 1) Petitioner's substantial, 19 year, discipline-free employment history with Respondent, as well as her record of good performance in her duties as recorded in her performance reviews; 2) Petitioner received no training in "supportive counseling"; 3) the supportive counseling policy was not in writing; 4) Donahue and Isler admitted that they did not look at Petitioner's employment evaluations or the length of her employment before reaching their decisions; 5) the supportive counseling policy was not frequently enforced; 6) there was at least one other time that Respondent listened to allegations of abuse by local police and were told not to document it; and 7) Petitioner was honest and forthcoming throughout the entire investigation.
>
> . . . .
>
> 54. Respondent's investigation and treatment of Petitioner was also fundamentally unfair. This began with

violating Petitioner's procedural rights by erroneously prolonging her investigatory period without authorization. Respondent never spoke with Petitioner to learn why she applied "supportive counseling" or who trained her that way. Respondent then created self-serving hypotheticals to try to justify that this harm was not part of improper oversight and training on behalf of Respondent. Mr. Isler learned that intake workers were no longer applying "supportive counseling" after this incident, and did not inform the agency director. The pre-dismissal letter stated that the recommended discipline was a dismissal from the division, not the agency. The agency director refused to meet with Petitioner prior to her pre-disciplinary conference. Respondent's HR department told Petitioner to go back to the agency director. When the agency director learned, during the pre-disciplinary conference, that Petitioner understood [t]hat the recommendation was dismissal from the agency, she made no effort to correct the written notice of a second pre-disciplinary conference after she was made aware of the misrepresentation.

55. Respondent has met its burden of proof to show that Petitioner engaged in unacceptable conduct ["the greater weight of evidence demonstrates that Petitioner did not inform her supervisor of the allegations of child on child sexual abuse and did not create a . . . Computerized Report,"] however, after considering the totality of the facts and circumstances, Respondent did not have just cause to dismiss Petitioner from her employment.

56. Respondent substantially prejudiced Petitioner['s] rights; acted erroneously; failed to act as required by law; and acted arbitrarily and capriciously when Respondent dismissed Petitioner without just cause.

The findings of fact, supported by substantial evidence, indicate that on 26 July 2016, petitioner met with Victor Isler, Program Manager Linda Alexander, and Supervisor Alicia Weaver. Petitioner was honest and forthcoming regarding the events which had occurred 20 and 21 June 2016 while counseling the father, the mother, and the son. Petitioner stated that she applied respondent's supportive counseling policy as she understood it—a policy that was never set out or reduced to writing. Isler informed petitioner that there would be an investigation and that she would be temporarily reassigned to the dayshift due to

the investigation. The reassignment was to last 33 calendar days, until 29 August 2016. Respondent demanded that petitioner document her statements during the 26 July 2016 meeting and to create a CPS report. Petitioner complied with both requests. On 29 August 2016, respondent informed petitioner that her temporary assignment was extended until 12 September to "further investigate" and "allow time to schedule and conduct a pre-disciplinary conference subject to agency findings."

During the investigation, social workers were individually invited to meet with Isler, Alexander, and Weaver and posed hypothetical questions to determine how the social workers would respond with regard to applying supportive counseling. The social workers were aware that petitioner had been reassigned due to an internal investigation regarding supportive counseling. At least two responses indicated that "[i]n the past, we would have offered supportive counseling, but currently we're going to make a report," and "two weeks ago I would have provided information, but now I document everything." The findings from the social worker interviews were not shared with Agency Director Debra Donahue. Petitioner was not asked how she was trained to apply supportive counseling, and petitioner was not asked to respond to the hypotheticals. Petitioner's after-hours supervisor, Michael Stanfield, was not asked to provide a written account of what he recalled of the 20 June 2016 events and was not provided petitioner's written account of her statements made during the 26 July 2016 meeting with Isler, Alexander, and Weaver.

On 12 September 2016, petitioner was notified of a pre-disciplinary conference scheduled for 15 September to address unacceptable personal conduct and grossly inefficient job performance. "The purpose of the conference is to discuss the recommendation the [respondent] dismiss you from the position of Senior Social Worker with the Family and Children's division of [respondent]." Petitioner asked to speak with Agency Director Donahue, but was told that Donahue could not speak with her about the conference. Petitioner contacted her county human resources representative and made an appointment to meet on 14 September. On 13 September, petitioner received an email cancelling the meeting with the human resources representative.

During the 15 September pre-disciplinary conference on petitioner's dismissal, Agency Director Donahue informed petitioner that the conference was to consider petitioner's dismissal from the *agency*, not just the *division*. Petitioner's response was that she was "floored, almost speechless." Respondent did not provide petitioner with a new notice for a pre-disciplinary conference or a new pre-disciplinary conference.

On 22 September 2016, petitioner received a ten page dismissal letter stating "effective as of today . . . you are dismissed from your position as a Senior Social Worker with [respondent]."

Upon review of the record and respondent's arguments, we hold respondent has failed to raise a meritorious argument significantly challenging these conclusions of law or the underpinning findings of fact. Therefore, we hold that substantial evidence supports the findings of fact, and that the findings of fact support the ALJ's challenged conclusions of law 51, 54, 55, and 56. Accordingly, we overrule respondent's arguments.

*V*

**[4]** Lastly, respondent argues that the ALJ erred by concluding that petitioner is entitled to remedies under 25 N.C.A.C. 01J.1306, including an award of attorney's fees and back pay. We agree.

In his final decision, the ALJ

> ORDERED that Petitioner . . . be reinstated to her position as Senior Social Worker, or comparable position . . . . Petitioner shall be retroactively reinstated to this position of employment with the Respondent, with all applicable back pay and benefits. Respondent shall pay to Petitioner and her attorney all reasonable attorney fees and cost incurred in this Contested Case pursuant to N.C.G.S. § 150B-33(11).

*Back Pay*

Pursuant to Subchapter J of Title 25 within our Administration Code, in a grievance an employee may receive back pay "in all cases in which back pay is warranted by law." 25 N.C. Admin. Code 01J.1306(1) (2018). This Court has held that Title 25's Subchapter J applies to State employees, while Subchapter I applies to local government employees. *Watlington*, ___ N.C. App. at ___, 799 S.E.2d at 403. "[A] local government employee shall mean those employees of local social services departments, public health departments, mental health centers and local offices of civil preparedness which receive federal grant-in-aid funds." 25 N.C. Admin. Code 01A .0103(6) (2018).

> Title 25 contains the rules adopted by the [State Human Resources] Commission and includes distinct subchapters on various personnel topics. . . . .

> Subchapter I, "Service to Local Governments," provides the procedures and rules specific to the personnel system developed for local government employees, including subsections on recruitment and selection, classification, and compensation. *See* 25 NCAC 01I.1800, .1900, and .2100 (2016). Subchapter I includes a separate subsection on "Disciplinary Action: Suspension, Dismissal and Appeals," which includes rules regarding just cause and dismissal for unacceptable personal conduct. 25 NCAC 01I.2301 and .2304 (2016). These rules vary slightly from the rules and procedures stated under Subchapter J. *See* 25 NCAC 01J.0603–.0618.

*Id.* at ___, 799 S.E.2d at 402.

Respondent argues that it is a local government agency that is governed by Subchapter I of the N.C. Admin. Code, Title 25—not Subchapter J. We agree. Therefore, the ALJ erred in awarding petitioner back pay pursuant to Title 25 N.C. Admin. Code 01J.1306. On this ground, we vacate the portion of the order in the final decision to award back pay.

*Attorney's Fees*

"N.C. Gen. Stat. § 150B-33[(b)](11) allows [an] ALJ to award attorney's fees . . . under certain circumstances[.]" *Watlington*, ___ N.C. App. at ___, 799 S.E.2d at 405. Pursuant to General Statutes, section 150B-33, "[a]n administrative law judge may . . . [o]rder the assessment of reasonable attorneys' fees . . . against the *State agency* involved in contested cases decided . . . under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay." N.C. Gen. Stat. § 150B-33(b)(11) (2017) (emphasis added).

Here, respondent is not a State Agency. Accordingly, the ALJ was without authority to award petitioner's attorneys' fees pursuant to section 150B-33(b)(11). Accordingly, we vacate the portion of the order in the final decision to award attorney's fees.

AFFIRMED IN PART; VACATED IN PART.

Judges DILLON and TYSON concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ISAIAH ALLEN

No. COA18-34

Filed 6 November 2018

**Constitutional Law—effective assistance of counsel—no direct appeal**

The direct appeal of an ineffective assistance of counsel claim was dismissed without prejudice to the right to file a motion for appropriate relief in the trial court where the record was inadequate for review on appeal.

Appeal by defendant from judgment entered 6 January 2017 by Judge Daniel A. Kuehnert in Burke County Superior Court. Heard in the Court of Appeals 22 August 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.*

*Cooley Law Office, by Craig M. Cooley, for defendant-appellant.*

ZACHARY, Judge.

Christopher Isaiah Allen ("Defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of sexual offense with a child. After careful review, we conclude that the record is insufficient to enable our review of Defendant's claim that he received ineffective assistance of counsel at trial. Accordingly, we dismiss his appeal without prejudice to his right to pursue this claim by filing a motion for appropriate relief in the trial court.

**Background**

On 2 March 2015, the Burke County Grand Jury indicted Defendant for sexual offense with a child. Defendant's case came on for trial on 4 January 2017. Two days later, the jury found Defendant guilty of sexual offense with a child. Defendant gave oral notice of appeal.

On appeal, Defendant argues that he received ineffective assistance of counsel because: (1) Defendant's trial counsel neither objected to nor moved to edit or redact portions of prejudicial, inadmissible evidence;

and (2) in the alternative, the cumulative errors made by trial counsel deprived Defendant of a fair trial.

**Discussion**

Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel" at a full evidentiary hearing on the merits of the ineffective assistance of counsel claim. *Id.* at 554, 557 S.E.2d at 547 (quoting *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000)).

The United States Supreme Court has also advised against reviewing ineffective assistance of counsel claims on direct appeal:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. *The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.* . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

*Massaro v. United States*, 538 U.S. 500, 504-05, 155 L. Ed. 2d 714, 720-21 (2003) (emphasis added).

In this case, our review is limited to the record before us, "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Stroud*, 147 N.C. App. at 554-55, 557 S.E.2d at 547 (citation, original alteration, and quotation marks omitted). Particularly where Defendant's arguments "concern potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *Id.* at 556, 557 S.E.2d at 548. As our Supreme Court has instructed, "should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent [motion for appropriate relief] proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

**Conclusion**

Defendant's ineffective assistance of counsel claim is premature in that the record before this Court is inadequate and precludes our review of whether Defendant's counsel was ineffective and whether counsel's errors, if any, were prejudicial. Accordingly, Defendant's appeal is dismissed without prejudice to his right to file a motion for appropriate relief in the trial court.

APPEAL DISMISSED.

Judges STROUD and MURPHY concur.

**STATE v. BENNETT**

[262 N.C. App. 287 (2018)]

STATE OF NORTH CAROLINA
v.
LEON BENNETT, DEFENDANT

No. COA18-294

Filed 6 November 2018

**Constitutional Law—motion for appropriate relief—immigration consequences of plea agreement—*Padilla* not retroactive**

The trial court erred in granting defendant's motion for appropriate relief in which defendant challenged his 1997 no contest plea on the basis that he was not properly informed by his counsel of the impact his conviction would have on his immigration status, including the risk of deportation. The case relied on by defendant for support, *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not apply retroactively.

Appeal by the State from order entered 13 June 2017 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 3 October 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.*

STROUD, Judge.

On issuance of a writ of certiorari, the State challenges an order granting defendant's motion for reconsideration and motion for appropriate relief. Because the requirements for counsel to advise a defendant of the immigration consequences of a plea agreement established by *Padilla* do not apply retroactively, we reverse.

In 1997, defendant pled no contest to possessing cocaine with the intent to sell or deliver. In 2015, defendant filed a motion for appropriate relief. Defendant alleged that at the time of his plea, "no factual basis existed in fact or in law to support that Defendant's possession of cocaine was with intent to sell and/or deliver." On 19 July 2016, at the hearing on the matter, defendant raised a claim under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), and argued he was not informed of the

impact his conviction would have on his immigration status, particularly the risk of deportation. The trial court specifically noted defendant was raising a ground not part of his filed MAR but allowed defendant to amend his written motion.

On 22 July 2016, defendant filed his amended MAR, alleging that when he entered his plea, he was not advised, as required by *Padilla*, "that a criminal felony conviction could be a basis for deportation proceedings." On 18 August 2016, the trial court entered an order denying defendant's MAR. The trial court found that "Defendant was advised of the consequences regarding the possibility of deportation, exclusion from this country, and the denial of naturalization under federal law at the time the plea was entered, as evidenced by the transcript of plea contained in the court file[.]" The order also decreed that "Petitioner's failure to assert any other grounds in his Motion is a BAR to any other claims, assertions, petitions, or motions he might hereafter file in this case, pursuant to N.C.G.S. §15A-1419[.]" (Emphasis in original).

In 2017, defendant filed a motion to reconsider his amended MAR. Defendant's motion for reconsideration alleged he was entitled to reconsideration under *State v. Nkaim*, 369 N.C. 61, 791 S.E.2d 457 (2016). The application of *Padilla* as discussed in *Nkaim* was the only ground for reconsideration defendant alleged. The trial court held a hearing on the motion to reconsider on 1 June 2017, and on 13 June 2017, the trial court entered an order granting defendant's motion for reconsideration and his MAR. The trial court found that defendant "was not informed of the absolute consequences that he would be removed and/or deported by the Federal Government as a result of his 'nolo contendere' plea for a time served sentence" and decreed that he was "not provided effective counsel," "denied the right to trial by jury[,]" and convicted "in violation of the Constitution of the United States or the Constitution of North Carolina." (Quotation marks omitted.) The State filed a petition for a writ of certiorari, which this Court allowed.

As noted, defendant's motion for reconsideration was based on *Nkaim*, and his argument at the hearing also focused on *Nkaim*, which his counsel argued "surprised a lot of the bar" and placed a "fairly heavy burden" on defense counsel by going "beyond what a lot of people interpreted *Padilla*" required "as just advising of risk." *Nkaim* was decided by this Court in 2015, and the North Carolina Supreme Court ultimately concluded *per curiam* that discretionary review was improvidently allowed. *See Nkaim*, 369 N.C. 61, 791 S.E.2d 457. Defendant's counsel argued that when the trial court denied his original MAR, the precedential value of *Nkaim* was "pretty much clouded" but since the Supreme

Court had dismissed the appeal, *Nkaim* had become "the law of this state[.]" Defense counsel argued that because *Nkaim* required counsel to advise an immigrant defendant he would be deported, and not just that he had a risk of deportation, his plea was not entered knowingly and voluntarily under *Padilla*. Defendant argued no basis for reconsideration or for his MAR other than his counsel's failure to advise him of the consequences of his plea based upon *Padilla* and *Nkaim*.

On appeal, the State contends the trial court erred in allowing defendant's motion for appropriate relief because *Padilla* does not apply retroactively to defendant. The State is correct; in *State v. Alshaif*, this Court determined *Padilla* did not apply retroactively and concluded:

> *Padilla* raises the question of the extent to which attorneys can be expected to anticipate the expansion of their obligations under *Strickland* and the Sixth Amendment. We conclude that *Padilla* was a significant departure from prior requirements and hold that the decision therefore created a new rule, *the retroactive application of which would be unreasonable*. We therefore hold that the trial court did not err by concluding that *Padilla* was inapplicable to Defendant's case.

*State v. Alshaif*, 219 N.C. App. 162, 171, 724 S.E.2d 597, 604 (2012) (emphasis added).

Defendant entered his plea in 1997; *Padilla* was decided in 2010, and is not applied retroactively. *See id*. Defendant's and the trial court's reliance upon *Nkaim* is misplaced because it does not address retroactivity. In *Nkaim*, the defendant entered his plea in 2013, so the requirements of *Padilla* applied. *See generally State v. Nkaim*, 243 N.C. App. 777, 778, 778 S.E.2d 863, 864 (2015). Based upon *Padilla*, *Nkaim* held that counsel must advise the defendant not just of a *risk* of deportation if the consequence of the particular conviction is clearly deportation. *Id*. at 786, 778 S.E.2d at 869. But since *Padilla* does not apply retroactively, *Nkaim* also has no application to defendant's plea or MAR. We therefore reverse the trial court's order. Because we are reversing based on *Padilla*, we need not address the State's other issue on appeal.

Defendant contends this Court should affirm the order because the trial court found a second ground, not based on *Padilla*, for allowing his MAR. Defendant further argues that since the State has failed to address any basis for the MAR other than *Padilla* in its brief, the State has waived by failing to challenge the alternate ground. Defendant bases this argument mostly on the trial court's statement near the end of the

hearing, "I'm thinking out loud, does that make this plea not a knowing, willful, understanding or as they say on the back here, it's the informed choice of the defendant made freely, voluntarily and understandingly, *without even considering Padilla*[.]" (Emphasis added.) Defendant also contends the order is based upon something other than *Padilla* based upon the portion of the order which states, "[t]he Court further finds his plea was not the result of an effective waiver of his State and Federal Constitutional rights to trial by jury, nor was he effectively advised of the same[.]" But defendant's argument takes the trial court's "thinking out loud" and the quoted portion of the order entirely out of context. Defendant's amended MAR and motion to reconsider raised only one basis for relief: that he was not properly informed of the consequences of his plea under *Padilla*. Defendant's argument at the hearing addressed the same issue and no other. In fact, defendant does not argue any possible facts that could even support a conclusion he did not enter into his plea voluntarily and understandingly other than failure to be sufficiently advised of his rights under *Padilla*.

Because *Padilla* does not apply retroactively, the trial court erred by granting defendant's MAR on this basis, so we reverse and remand.

REVERSED and REMANDED.

Judges DILLON and BERGER concur.

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STATE OF NORTH CAROLINA
v.
JALA NAMREH BOOKER

No. COA18-165

Filed 6 November 2018

**1. Embezzlement—indictment—fraudulent intent—acts constituting embezzlement**

The Court of Appeals rejected defendant's argument that her embezzlement indictment was invalid for failure to allege fraudulent intent and to specify the acts constituting embezzlement. The concept of fraudulent intent was contained within the meaning of "embezzle" and the allegation that she "embezzled $3,957.81 entrusted to her in a fiduciary capacity as an employee of Interstate All Battery Center" adequately apprised her of the charges against her.

**2. Criminal Law—jury instructions—disjunctive—appropriate theory supported by evidence**

The trial court's error in instructing the jury on an alternative theory of embezzlement unsupported by the evidence did not rise to the level of plain error where the appropriate theory of embezzlement was supported by overwhelming evidence.

**3. Evidence—post-arrest silence—door opened by defendant**

The trial court did not plainly err by permitting testimony concerning defendant's post-arrest silence where defendant opened the door for the prosecutor to ask a police detective about his attempts to contact her. Even assuming that the portion of the testimony concerning the extent to which other defendants facing embezzlement charges had spoken to the detective was improper, there was no probable impact on the jury given the overwhelming evidence against defendant.

Appeal by defendant from judgment entered 20 July 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 5 September 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.*

*Joseph P. Lattimore for defendant-appellant.*

DAVIS, Judge.

In this appeal, we address whether (1) an indictment for embezzlement was legally sufficient where it failed to expressly allege fraudulent intent and did not specify the acts allegedly constituting embezzlement; (2) the trial court committed plain error by instructing the jury on an element of embezzlement not supported by the evidence; and (3) the trial court plainly erred by allowing testimony concerning the defendant's post-arrest silence. After a thorough review of the record and applicable law, we conclude that the defendant received a fair trial free from prejudicial error.

**Factual and Procedural Background**

The State introduced evidence at trial tending to show the following facts: In 2013, Marjorie Hetzel owned Interstate All Battery Center franchises in Danville, Virginia and Greensboro, North Carolina. In November 2013, Hetzel hired Jala Namreh Booker ("Defendant") as

the office manager for the Greensboro franchise. As part of her duties as office manager, Defendant was responsible for the daily reports generated from the register, managing accounts payable and receivable, and occasionally assisting with sales. None of the store's other employees were responsible for bookkeeping or "keeping track of the money" in any capacity.

At the close of business each day, Defendant was required to generate a daily activity report from the cash register summarizing the store's monetary transactions for that day. After verifying that the cash register actually contained the amount of money listed in the daily activity report, she was supposed to place the money from the cash register in a bank deposit bag and lock the bag in a cabinet on the store's premises overnight. On the following business day, Defendant was expected to take the money in the bag to the bank and deposit it.

Prior to June 2015, Hetzel did not have any concerns about Defendant's job performance or her handling of the business's finances. That month, Defendant called Hetzel to express confusion over how she should handle five dollars that an outside salesman had placed in the cash register. Upon arriving at the store, Hetzel asked Defendant for the applicable deposit ticket. In response, Defendant retrieved from her car five separate envelopes containing cash, checks, and deposit slips. Together, the envelopes contained over $10,000.

Hetzel immediately began reviewing the business's financial records and noticed that the previous deposit made by Defendant was $447 short. When Hetzel asked her about the missing funds, Defendant stated that the money was in the envelopes she had retrieved from her car. Hetzel told Defendant to deposit the money in the envelopes immediately, and she did so. Hetzel fired Defendant the following day.

On 22 June 2015, Hetzel contacted the Greensboro Police Department regarding financial discrepancies in her business records and subsequently discussed her concerns with Detective Edward Bruscino. After analyzing various financial documentation and bank records provided to him by Hetzel, Detective Bruscino determined that discrepancies existed during the time period when Defendant was employed between the amount of money that should have been deposited and the amount that was actually deposited.

Detective Bruscino focused his investigation on the months of December 2014 and March 2015 because those "were the months that truly showed where cash was missing from multiple deposits." On numerous dates during those months, Defendant had either deposited

less money than the business's financial records indicated should have been deposited or she did not make a deposit at all. At no point during her employment did Defendant ever inform Hetzel about any financial discrepancies related to the business.

Defendant was indicted by a grand jury on 23 January 2017 on the charge of embezzlement. A jury trial was held beginning on 19 July 2017 before the Honorable Michael D. Duncan in Guilford County Superior Court. At the close of the State's evidence, Defendant moved to dismiss the embezzlement charge, and the trial court denied the motion. She renewed her motion to dismiss at the close of all the evidence, which was once again denied.

On 20 July 2017, the jury found Defendant guilty of embezzlement. The trial court sentenced her to a term of 6 to 17 months imprisonment, suspended the sentence, and placed Defendant on supervised probation for a period of 60 months. The court also ordered her to pay restitution in the amount of $4,100.67. Defendant filed a timely notice of appeal.

## Analysis

On appeal, Defendant argues that the trial court erred by (1) denying her motion to dismiss the embezzlement charge on the ground that the indictment was facially invalid; (2) instructing the jury on an element of embezzlement not supported by the evidence; and (3) permitting testimony concerning her post-arrest silence. We address each argument in turn.

### I. Motion to Dismiss

**[1]** Defendant first contends that the trial court erred by denying her motion to dismiss. Specifically, she asserts that the indictment was invalid because it failed to allege any fraudulent intent on her part and did not specify the acts committed by her that constituted embezzlement. We disagree.

An indictment must contain

> a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

*State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (citation, quotation marks, and brackets omitted). An indictment that "fails to

state some essential and necessary element of the offense" is fatally defective, *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted), and if an indictment is fatally defective, the trial court lacks subject matter jurisdiction over the case. *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012).

An indictment "is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense." *State v. Stroud*, __ N.C. App. __, __, 815 S.E.2d 705, 709 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, __ N.C. __, 817 S.E.2d 573 (2018). A defendant has received sufficient notice "if the illegal act or omission alleged in the indictment is clearly set forth so that a person of common understanding may know what is intended." *State v. Haddock*, 191 N.C. App. 474, 477, 664 S.E.2d 339, 342 (2008) (citation and quotation marks omitted). Furthermore, "while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (citation and quotation marks omitted). On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

N.C. Gen. Stat. § 14-90 provides, in pertinent part, as follows:

> (a) This section shall apply to any person:
>
> . . . .
>
> (4) Who is an officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person.
>
> (b) Any person who shall:
>
> (1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or
>
> (2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, any money, goods or other chattels, bank note, check or order for the payment of money . . . or any other valuable security whatsoever that (i) belongs to any other person or corporation . . . which shall

> have come into his possession or under his care, shall be guilty of a felony.

N.C. Gen. Stat. § 14-90 (2017).

This Court has explained that in order to convict a defendant of embezzlement the State must prove the following essential elements:

> (1) [T]hat defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal; (2) that he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship; and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use the money or valuable property of his principal which he had received in his fiduciary capacity.

*State v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 383 (1987) (citation omitted). With regard to the third element, " '[t]he State does not need to show that the agent converted his principal's property to the agent's own use, only that the agent fraudulently or knowingly and willfully misapplied it[.]" *State v. Parker*, 233 N.C. App. 577, 580, 756 S.E.2d 122, 124-25 (2014) (citation omitted).

In the present case, Defendant's indictment stated, in pertinent part, as follows:

> [D]efendant named above unlawfully, willfully and feloniously did embezzle three thousand nine hundred fifty seven dollars and eighty one cents ($3,957.81) in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center. At the time the defendant was over 16 years of age and was the employee of AMPZ, LLC d/b/a Interstate All Battery Center and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property.

Defendant first argues that her indictment failed to adequately allege that she acted with fraudulent intent. As quoted above, the indictment stated that Defendant "unlawfully, willfully and feloniously did embezzle" $3,957.81 in her capacity as an employee of Interstate All Battery Center. Defendant nevertheless contends that her indictment was facially invalid because it merely stated that she "did embezzle" a sum of money without specifically alleging that she did so with a

fraudulent intent. However, "embezzle" has been defined as "to appropriate (as property entrusted to one's care) fraudulently to one's own use." Webster's Ninth New Collegiate Dictionary 406 (9th ed. 1991); *see also State v. Smithey*, 15 N.C. App. 427, 429, 190 S.E.2d 369, 370 (1972) ("Fraudulent intent which constitutes a necessary element of the crime of embezzlement . . . is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held." (citation and quotation marks omitted)).

Thus, the concept of fraudulent intent is already contained within the ordinary meaning of the term "embezzle." As noted above, a defendant receives sufficient notice where the allegations in the indictment permit a "person of common understanding [to] know what is intended." *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 342 (citation and quotation marks omitted). Defendant makes no contention in her appellate brief that she was prejudiced in her ability to prepare a defense based upon a misapprehension of the meaning of the term "embezzle."

Moreover, this Court has held that an allegation that a defendant acted willfully "implies that the act is done knowingly" and "suffice[s] to allege the requisite knowing conduct" for purposes of determining the validity of an indictment. *Harris*, 219 N.C. App. at 595-96, 724 S.E.2d at 637-38 (citation and quotation marks omitted). As discussed above, in order to convict a defendant of embezzlement the State is required to prove that she "fraudulently *or* knowingly and willfully misapplied or converted to [her] own use" the property of her principal. *Melvin*, 86 N.C. App. at 298, 357 S.E.2d at 383 (emphasis added). Thus, the allegation contained in Defendant's indictment that she "unlawfully, willfully and feloniously did embezzle" can fairly be read to allege that she "knowingly and willfully" embezzled from her employer. Therefore, we are satisfied that the indictment is not insufficient for failing to specifically allege a fraudulent intent on the part of Defendant.

We find similarly unavailing Defendant's contention that her indictment was defective for failing to specify the acts constituting embezzlement. She makes the conclusory assertion that "the ambiguous term 'embezzle' " was inadequate to properly inform her of the charge against her. However, we find nothing vague or insufficiently particular about the allegations contained in the indictment. Indeed, it alleges that Defendant embezzled $3,957.81 entrusted to her in a fiduciary capacity as an employee of Interstate All Battery Center. We fail to see how these allegations would not adequately apprise Defendant as to the charges facing her or prejudice her ability to prepare a defense. Accordingly,

we hold that the trial court did not err in denying Defendant's motion to dismiss. *See State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 884 (1978) (upholding validity of indictment where "Defendant was sufficiently informed of the accusation against him").

## II. Jury Instructions

**[2]** Defendant next contends that the trial court erred by instructing the jury that it could convict her of embezzlement based upon the theory that she "did take and make away with U.S. currency with the intent to embezzle" where the State's sole theory at trial was instead that she "misapplied" the money. Although Defendant concedes that the trial court did, in fact, correctly charge the jury as to the theory of misapplication, she nevertheless asserts that the erroneous instruction on an alternative theory entitles her to a new trial.

Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Our appellate courts have held that a new trial is required where a trial court instructs the jury — over the objection of the defendant — on a theory of the defendant's guilt that is not supported by the evidence presented at trial. *See*, *e.g.*, *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (holding new trial required where trial court instructed jury on alternative theory unsupported by the evidence); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) ("Where

the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial." (citation omitted)).

However, a new trial is not necessarily required as a result of such an error in cases where no objection is raised at trial.

> Recently . . . , our Supreme Court has declared that such instructional errors not objected to at trial are not plain error *per se*. In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), the Supreme Court, adopting a dissent from this Court, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), declared an additional requirement for a defendant arguing an unpreserved challenge to a jury instruction as unsupported by the evidence. The Court in *Boyd* shifted away from the long standing assumption that the jury based its verdict on the theory for which it received an improper instruction, and instead placed the burden on the defendant to show that an erroneous disjunctive jury instruction had a probable impact on the jury's verdict.

*State v. Malachi*, __ N.C. App. __, __, 799 S.E.2d 645, 649 (2017) (internal citations and quotation marks omitted). Thus, a reviewing court conducting a plain error analysis in this context "is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory." *State v. Robinson*, __ N.C. App. __, __, 805 S.E.2d 309, 318 (2017) (citation and quotation marks omitted).

In the present case, the trial court instructed the jury, in pertinent part, as follows:

> The defendant in this case, members of the jury, has been charged with embezzlement by virtue of employment. For you to find the defendant guilty of this offense, the state must prove three things beyond a reasonable doubt: First, that the defendant was an agent or clerk of AMPZ, LLC, doing business as Interstate All Battery Center.
>
> Second, that while acting as an agent or clerk, U.S. currency came into the defendant's possession or care.

> And third, that the defendant *did take and make away with* U.S. currency with the intent to embezzle and fraudulently, knowingly, and willfully misapply and/or convert U.S. currency into the defendant's own use.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant was an agent or clerk of AMPZ, LLC, doing business as Interstate All Batteries Center, that while the defendant was acting as agent or clerk, U.S. currency came into the defendant's possession or care, and that the defendant embezzled and/or fraudulently or knowingly and willfully misapplied or converted to the defendant's own use U.S. currency with the intent to embezzle, fraudulently or knowingly and willfully misapply or convert U.S. currency to the defendant's own use, it would be your duty to return a verdict of guilty.

(Emphasis added.)

Defendant argues that the trial court committed plain error by instructing the jury on an alternative theory of guilt not supported by the evidence — namely, by including as an element of embezzlement that she "did take and make away with" money entrusted to her in a fiduciary capacity. She concedes, however, that the jury was "correctly instructed on the law arising from the evidence" during the trial court's summation of the elements of embezzlement. Nevertheless, Defendant contends that the trial court deprived her of the right to a unanimous verdict by charging the jury "correctly at one point and incorrectly at another."

We are unable to conclude that the trial court's instructions amounted to plain error. Here, Defendant was the only store employee responsible for depositing money into Interstate All Battery Center's bank account. She was also the only employee whose duties included maintaining financial records and "keeping track of the money." Detective Bruscino testified with regard to numerous dates throughout Defendant's employment on which she should have made cash deposits but either did not deposit any cash at all or deposited less money than she should have. Furthermore, Defendant never expressed any concerns to Hetzel regarding difficulty in balancing the books or the existence of discrepancies in financial records.

The evidence that Defendant misapplied money entrusted to her in a fiduciary capacity was overwhelming. Therefore, it cannot reasonably

be argued that the jury "probably would have returned a different verdict," *see Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327, but for the trial court's error in instructing it upon the alternative theory that Defendant "did take and make away with" her employer's money. Accordingly, we hold that the trial court's error did not rise to the level of plain error. *See Robinson*, __ N.C. App. at __, 805 S.E.2d at 319 (no plain error where improper instruction on alternative theory not supported by the evidence "did not play a significant role in the jury's decision").

**III. Testimony Concerning Post-Arrest Silence**

**[3]** Finally, Defendant argues that the trial court plainly erred by permitting Detective Bruscino to testify with regard to her post-arrest silence. Specifically, she asserts that the admission of this testimony violated her Fifth Amendment right against self-incrimination. Once again, we disagree.

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). This Court has held that "a defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting the defendant's prior silence is inconsistent with his present statements at trial." *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010) (citation omitted).

At trial, the following exchange took place between Defendant's counsel and Detective Bruscino on cross-examination:

> [DEFENSE COUNSEL]: Did you ever interview [Defendant] in connection with this case?
>
> [DETECTIVE BRUSCINO]: I did not.
>
> [DEFENSE COUNSEL]: Did you attempt to try to locate her before you issued a warrant to speak with her about it?
>
> [DETECTIVE BRUSCINO]: Yes. We went to multiple locations looking for her. We had many, many addresses to go to, but we didn't go to all of them. We could only go to a few of them. And we weren't able to locate [Defendant].
>
> [DEFENSE COUNSEL]: Did you come to find out how this warrant was served on her?

[DETECTIVE BRUSCINO]: I did not. All I got was notification that it was served.

[DEFENSE COUNSEL]: Okay. So you weren't ever notified that she turned herself in on this case?

[DETECTIVE BRUSCINO]: No.

. . . .

[DEFENSE COUNSEL]: So did you go to the Rankin King address?

[DETECTIVE BRUSCINO]: The Rankin King address? Yes, we did. We knocked on that door.

[DEFENSE COUNSEL]: Okay. And do you know what happened when you knocked on that door?

[DETECTIVE BRUSCINO]: No one was home. Typically when no one is home, we leave a business card with a phone number on it.

[DEFENSE COUNSEL]: Did you come to find out later that was her mother's address?

[DETECTIVE BRUSCINO]: I did not.

[DEFENSE COUNSEL]: So you didn't go back at any point to try to knock on the door again later?

[DETECTIVE BRUSCINO]: No. We had left a card, as well as that was the address on her license.

[DEFENSE COUNSEL]: Okay. So after [Defendant] did turn herself in when she found out about the warrant, did you try to make an interview with her after that?

[DETECTIVE BRUSCINO]: I did not.

Immediately after the above-quoted testimony from Detective Bruscino, the following exchange took place on redirect examination:

[PROSECUTOR]: Detective Bruscino, after you left your card at the residence listed on [Defendant's] driver's license, when was it after you did that that [Defendant] called you to talk to you?

[DETECTIVE BRUSCINO]: [Defendant] never made contact with me.

> [PROSECUTOR]: After you took out charges and [Defendant] was served, when did [Defendant] call you so she could come in and talk to you about this?
>
> [DETECTIVE BRUSCINO]: She never contacted me.
>
> [PROSECUTOR]: Has [Defendant] ever emailed you, voicemailed you or anything to come in and discuss all of this with you?
>
> [DETECTIVE BRUSCINO]: She's never made contact with me.
>
> [PROSECUTOR]: And have you met with people accused of embezzlement and gone over records and things with people who are facing these type of charges?
>
> [DETECTIVE BRUSCINO]: Yes. Many times people will come in to discuss any allegations against them.
>
> [PROSECUTOR]: And do you consider that part of your job?
>
> [DETECTIVE BRUSCINO]: Yes.

Defendant contends that Detective Bruscino's testimony on redirect examination violated her Fifth Amendment right against self-incrimination. The State argues, in response, that Defendant "opened the door" to such testimony. The legal concept of "[o]pening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Ligon*, 206 N.C. App. 458, 467, 697 S.E.2d 481, 487 (2010) (citation and quotation marks omitted). Thus, "the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *Id.* at 466, 697 S.E.2d at 487 (citation, quotation marks, and brackets omitted). The State asserts that Defendant opened the door to Detective Bruscino's testimony by pursuing a line of inquiry on cross-examination centered around his attempts to contact Defendant both prior to and following her arrest.

We agree with the State that Defendant opened the door for the prosecutor to ask Detective Bruscino about his attempts to contact her. However, we are not persuaded that Defendant similarly opened the door for testimony concerning the extent to which *other* defendants facing embezzlement charges had spoken to Detective Bruscino in the past.

Nevertheless, even assuming *arguendo* that this portion of Detective Bruscino's testimony was improper, because Defendant failed to object to this exchange at trial she is once again limited to plain error review on appeal. *See State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 580 (2016) ("Defendant did not object to this testimony at trial. Therefore, our review is limited to plain error." (citation omitted)), *disc. review denied*, 369 N.C. 483, 795 S.E.2d 221 (2017).

Based on our thorough review of the record, we fail to see how this portion of Detective Bruscino's testimony could have had a probable impact on the jury's verdict. Therefore, we hold that the trial court's admission of the challenged testimony did not constitute plain error. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached.").

**Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and DILLON concur.

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STATE OF NORTH CAROLINA
v.
WILLIAM JESSE BUCHANAN, DEFENDANT

No. COA16-697-2

Filed 6 November 2018

**False Pretense—checks—affidavit to obtain credit—single taking rule**

Defendant met his burden of showing plain error in a prosecution arising from his having submitted one false affidavit to obtain credit from a bank for three checks. The bank extended credit for only one of the three checks and defendant was convicted of obtaining property by false pretense and attempting to obtain property by false pretense, in violation of the single taking rule. Defendant committed a single act—filing one affidavit, not three — and there was

no evidence from which the jury could have inferred three affidavits. The trial court erred by not instructing the jury that it could not convict on both counts.

Appeal by Defendant from judgments entered 15 March 2016 by Judge Alan Z. Thornburg in Yancey County Superior Court.

Originally heard in the Court of Appeals 31 January 2017. By opinion filed 6 June 2017, this Court found no reversible error.

By Order entered 20 September 2018, our Supreme Court vacated the portion of our 6 June 2017 opinion "discussing jury instructions, the single taking rule, and double jeopardy," and remanded the matter for us to consider whether "the trial court committed plain error by failing to instruct the jury that it could not convict Mr. Buchanan of obtaining property by false pretense and attempting to obtain property by false pretense because such a verdict would violate the 'single taking rule.' "

*Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State.*

*The Epstein Law Firm PLLC, by Drew Nelson, for Defendant.*

DILLON, Judge.

Upon certification by our Supreme Court, we review whether the trial court committed plain error by failing to instruct the jury that it could not convict the Defendant of obtaining property by false pretenses and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule." We conclude that the trial court committed plain error in this regard and, therefore, vacate one of the two judgments, namely, the judgment for attempting to obtain property by false pretenses in 15CRS050081.

## I. Background

Defendant was indicted for two counts of false pretenses for signing a "Check Fraud/Forgery Affidavit" with his bank, disputing three checks written off his account totaling $900. Evidence showed, however, that Defendant, in fact, had pre-signed the three checks, gave them to the mother of his daughter, and authorized her to use them in the care of their daughter. Based on Defendant's representation in the affidavit, the bank gave Defendant temporary credit for one of the three checks, a $600 check, but denied him credit for two other checks, a $200 check and a

$100 check. A more detailed recitation of the facts may be found in our prior opinion. *State v. Buchanan*, ___ N.C. ___, 801 S.E.2d 366 (2017).

Defendant was tried by a jury and convicted of (1) obtaining property by false pretense for a $600 provisional credit placed in his bank account and separately of (2) attempting to obtain property by false pretense for $100 and $200 checks. After being convicted of both counts, Defendant pleaded guilty to being an habitual felon. The trial court sentenced him to two active terms to run concurrently.

In the first appeal, Defendant argued that his multiple convictions violated the "single taking rule," contending that his act of signing a single affidavit could only constitute one crime. We held that his argument was constitutional in nature, as a double jeopardy issue, and concluded that Defendant failed to preserve his constitutional argument. Accordingly, we found no error.

Our Supreme Court, though, has vacated our holding and has remanded for our Court to consider whether the trial court committed plain error in failing to instruct the jury on the "single taking rule." On remand from our Supreme Court, we now consider that issue.

## II. Analysis

Defendant argues that the trial court erred in its jury instructions. More specifically, Defendant alleges that the trial court's instructions violated the "single taking rule." Since Defendant did not object to the instructions at trial, we review the trial court's instruction for plain error. *State v. Lawrence*, 365 N.C. 506, 507-08, 723 S.E.2d 326, 327-28 (2012).

Our Supreme Court has adopted the plain error standard for unpreserved instructional or evidentiary error. *State v. Odom*, 307 N.C. 655, 658-62, 300 S.E.2d 375, 377-79 (1983). "In deciding whether a defect in the jury instruction constitutes 'plain error,' [we] must examine the entire record and determine if the instructional error had a *probable impact* on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (emphasis added).

The crime of obtaining property by false pretenses can be satisfied if a defendant either "obtains" *or* "*attempts to obtain* value from another" by way of a false representation. N.C. Gen. Stat. § 14-100(a) (2015) (emphasis added). That is, under the language of N.C. Gen. Stat. § 14-100, one has completed the crime even if he merely attempts to obtain property by false pretenses.

At trial, the following instructions were given:

> Now, the defendant has been charged with obtaining property by false pretenses. For you to find the defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was, in fact, deceived by this representation; and fifth, that the defendant thereby obtained property from the victim.
>
> [ . . . ]
>
> Now, the defendant has also been charged with attempt to obtain property by false pretenses. For you to find the defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was, in fact, deceived by this representation; and fifth, that the defendant thereby attempted to obtain property from the victim.

Upon review of the whole record, we are satisfied that Defendant has met his burden in showing that the error amounted to plain error. Defendant submitted one affidavit, disputing three checks; there is no conflicting evidence on this fact. The submission of the one affidavit is the one act, or one false representation, for which Defendant was charged. Therefore, as explained in more detail below, we conclude that there was only a single act or taking under the "single taking rule." *State v. Rawlins*, 166 N.C. App. 160, 165-66, 601 S.E.2d 267, 271-72 (2004) (citing *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992)).

The "single taking rule" prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) ("[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place."); *see also State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996).

Our Court has applied the "single taking rule" to the crime of obtaining property by false pretenses in the context of indictments. *Rawlins*, 166 N.C. App. 160, 601 S.E.2d 267. In *Rawlins*, we concluded that the single taking rule did not apply where a defendant used stolen credit cards

on three separate, distinct occasions to obtain property, even though the three credit card swipes occurred within a twenty (20) minute period: "In this case, there were three distinct transactions separated by several minutes in which different credit cards were used. Thus, we conclude the indictments were not duplicative." *Id.* at 166, 601 S.E.2d at 272.

Applying the reasoning in *Rawlins* and the above-cited Supreme Court opinions, it follows that the number of acts committed by a defendant generally determines how many counts or crimes as to which he or she may be convicted. For instance, if a defendant purchased three items with one swipe of a stolen credit card, the act would constitute a single offense under N.C. Gen. Stat. § 14-100; and, if the combined value of the items was over $50,000, the defendant would be guilty of one Class C felony (as opposed to three Class H felonies). By contrast, if a defendant purchased the three items in three different credit card transactions separated by some amount of time, the defendant would be guilty of three distinct felonies because his actions would not constitute a "single taking."

In this case, there was evidence that the Defendant filed a single affidavit to obtain credit for the three checks, evidence which would support only a "single taking." The fact that Defendant was unsuccessful in obtaining a credit for all three checks is irrelevant – Defendant committed only one act, making a single false representation. Indeed, in the above example, if the defendant had attempted to purchase three items with a stolen credit card involving a single swipe, but was informed by the clerk that the card limit only allowed for the purchase of one of the items, the defendant would still only be guilty of a single crime.

We further conclude that the error in failing to instruct the jury on the "single taking rule" amounted to plain error. Specifically, the evidence in the light most favorable to the State demonstrates that Defendant obtained or attempted to obtain bank credit by signing a single affidavit;[1] there was no evidence from which the jury could have inferred that Defendant obtained or attempted to obtain credit for the three checks by signing multiple affidavits. Therefore, the failure to

1. It is true that Defendant signed each of the checks at different times for the mother of his child to use. However, the crimes for which Defendant was convicted did not involve pre-signing these checks. They involved his actions with his bank in attempting to obtain credit for those checks. Indeed, a defendant is guilty of only one count of obtaining property by false pretenses if he buys three shirts at once with a stolen credit card, even though he removed each shirt from a display rack at different points in time while in the store.

instruct on the "single taking rule" had a "probable impact" on the jury's finding Defendant guilty of two counts, rather than of only one count.

We note that the trial court entered two judgments: (1) a judgment based on one of the false pretense convictions and (2) a consolidated judgment based on the second false pretense conviction and the habitual felon conviction. We remand the matter to the trial court with instructions to vacate one of the false pretense convictions, to consider whether the vacation of the conviction affects Defendant's habitual felon status, and to re-sentence Defendant accordingly.

VACATED AND REMANDED.

Judges DAVIS and INMAN concur.

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STATE OF NORTH CAROLINA
v.
DWAYNE RAYSHON DEGRAFFENRIED

No. COA18-37

Filed 6 November 2018

**Criminal Law—prosecutor's closing arguments—defendant's right to a jury trial—plain error analysis**

There was no plain error in a prosecution for trafficking in cocaine where the prosecutor improperly argued that defendant had exercised his right to a jury trial despite the evidence against him. The evidence against defendant was overwhelming.

Appeal by defendant from judgment entered 23 August 2017 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 17 October 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General E. Burke Haywood, for the State.*

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.*

TYSON, Judge.

Dwayne Rayshon Degraffenried ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of trafficking cocaine by transportation and trafficking cocaine by possession. We find no error.

## I. Background

Guilford County sheriff's deputies entered the home of Jamie Yarborough to execute a search warrant they had obtained after several weeks of prior observation and surveillance. The search yielded approximately 28 grams of cocaine inside Yarborough's home. Greensboro Police officers arrived to participate in the investigation after the seizure of the cocaine.

Immediately after his arrest, Yarborough volunteered to contact his supplier, who officers later identified as Defendant. Yarborough called Defendant and requested he deliver approximately nine ounces of cocaine to Yarborough's home. Defendant arrived alone carrying a black drawstring bag. A sheriff's deputy deployed a "flash bang" to disorient Defendant and Yarborough, which caused both men to fall to the ground. Defendant, along with the black bag he carried, and Yarborough were taken into custody.

A North Carolina State Crime Lab forensic scientist later tested the white powder found inside the black bag carried by Defendant and determined it contained 248.25 grams of cocaine. Defendant was indicted for trafficking by possessing 200 or more but less than 400 grams of cocaine, and trafficking by transporting 200 or more but less than 400 grams of cocaine.

During closing arguments, the prosecutor, without objection, made references to Defendant's right to a jury trial and noted he had exercised that right despite "[a]ll of the evidence" being against him. The jury returned verdicts finding Defendant guilty of both charges. The court consolidated the offenses and sentenced Defendant to a minimum of 70 months and a maximum of 93 months of imprisonment. Defendant filed written notice of appeal the same day.

## II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

## III. Issue

Defendant argues the trial court erred by failing to intervene *ex mero motu* during the State's closing argument.

IV. Standard of Review

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, [o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

*State v. Waring*, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (internal quotation marks and citations omitted), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011).

V. Analysis

North Carolina General Statutes require of an attorney in closing arguments that:

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2017). We tender this statute to all counsel for review and compliance therewith as officers of the court.

"[A] criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997) (internal citations omitted). Defendant challenges the following portion of the State's closing argument as an improper reference to his exercise of his right to a jury trial:

> Truth be told, some cases, ladies and gentlemen, are tried because there is a genuine question with regard to

> the facts; one side claims this and the other side claims that. I would suggest, ladies and gentlemen, that that is not our scenario.
>
> Some cases are tried when there is a genuine question regarding the application of the law. There's a consensus about what actually occurred, but one side claims that it was not a violation of the law and the other side claims that it was. And this, again, ladies and gentlemen, is certainly not the case in our instance.
>
> All of the evidence is that the defendant knowingly possessed cocaine and transported it from one place to another. So[,] the question is, why is this case being tried. I would respectfully submit, ladies and gentlemen, it is because the defendant is facing a mandatory prison term.
>
> Simply put, the defendant is looking to exercise his right to a trial by jury, and he is entitled. Under our system of justice, one cannot be stripped of their liberty without due process of law. He wants a trial and he is granted a trial.

"[W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (emphasis supplied)

"[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citation and internal quotation marks omitted). The "relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citation and internal quotation marks omitted).

The prosecutor's comments were improper and satisfy the first prong of *Huey*. 370 N.C. at 179, 804 S.E.2d at 469. Counsel is admonished for minimalizing and referring to Defendant's exercise of his right to a trial by jury in a condescending manner.

Moving to the second step, Defendant has failed to show any reversible error by the trial court's failure to intervene *ex mero motu* under the

second prong of *Huey*. *Id.* Where overwhelming evidence of the defendant's guilt exists, our appellate courts "have not found statements that are improper [in and of themselves] to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

The evidence of Defendant's guilt was overwhelming. Yarborough identified Defendant as his cocaine supplier. Yarborough, in cooperation with sheriff's deputies and police officers, called Defendant to ask for another delivery of cocaine.

Defendant arrived alone at Yarborough's home and was apprehended with a black drawstring bag, which was later determined to contain almost 250 grams of cocaine. While the comments were improper, Defendant has failed to show the prosecutor's comments were so prejudicial to render Defendant's trial fundamentally unfair and to warrant the trial court's *ex mero motu* intervention in the absence of any objection. This argument is overruled.

## VI. Conclusion

The trial court did not commit plain error by declining to intervene *ex mero motu* during the State's closing argument in the absence of Defendant's failure to object or preserve error. Defendant received a fair trial, free from preserved or prejudicial error. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO PLAIN ERROR.

Judges CALABRIA and ZACHARY concur.

**STATE v. GUY**

[262 N.C. App. 313 (2018)]

STATE OF NORTH CAROLINA
v.
KEVIN DARNELL GUY, DEFENDANT

No. COA18-67

Filed 6 November 2018

**1. Appeal and Error—preservation of issues—pro se motion—writ of certiorari**

A writ of certorari was granted by the Court of Appeals for a robbery defendant where defendant filed a pro se notarized, handwritten "Motion for Appeal" with the superior court but failed to serve his motion on the State.

**2. Constitutional Law—right to confrontation—deceased victim—statements to officer—nontestimonial**

The trial court did not violate defendant's Sixth Amendment right to confront witnesses in a prosecution for robbery and other offenses by admitting testimony from an officer about statements made to him by the victim, subsequently deceased, after the robbery but before defendant had been apprehended. The Confrontation Clause of the Sixth Amendment only applied to testimonial statements. These statements were nontestimonial because they were provided in an effort to assist the police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects.

**3. Robbery—acting in concert—sufficiency of the evidence**

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where, even though defendant was not identified at the scene of the crime, the jury could have made reasonable inferences from the evidence that defendant acted in concert to commit the robbery.

**4. Possession of Stolen Property—constructive possession—drugs and stolen debit card—sufficiency of evidence**

The trial court did not err by denying defendant's motions to dismiss felony charges of possession of stolen goods and possession of marijuana. Both a stolen debit card and marijuana were found close to defendant and his car, and defendant and those with whom he acted in concert had the ability to exercise control over the contraband.

**5. Criminal Law—prosecutor's closing argument—reference to gang affiliation—no ex mero motu intervention**

There was no abuse of discretion in a robbery prosecution where the trial court did not intervene ex mero motu when the State's argument included a reference to defendant's gang affiliation. The prosecutor merely commented on the evidence presented by defendant at trial and did not focus on defendant's gang involvement. It has been consistently held that a prosecutor may argue that a jury is the voice and conscience of the community.

**6. Criminal Law—jury instruction—acting in concert—supported by the evidence**

The trial court did not commit plain error by instructing the jury on acting in concert where defendant contended that the instruction was not supported by the evidence. Even if defendant was not the person who had robbed the victim, there was substantial evidence that defendant was aiding or otherwise assisting others in a common plan or purpose to rob the victim and flee the scene.

**7. Constitutional Law—double jeopardy—robbery and possession of stolen goods—sentencing**

Although it was not raised below in a prosecution for robbery and possession of stolen goods, defendant's double jeopardy rights were violated where he was convicted of both crimes, requiring judgment to be arrested on the conviction for possession of stolen goods.

**8. Sentencing—consolidated sentence—judgment arrested—remanded for resentencing**

Defendant's consolidated sentence for misdemeanor possession of stolen goods and possession of marijuana was remanded where the judgment for possession of stolen goods was arrested. A defendant with this prior record level can only be sentenced to a maximum of 20 days in custody and the possession of marijuana sentence was for 60 days.

Appeal by defendant from final judgments entered 23 August 2017 by Judge Robert H. Hobgood in Granville County Superior Court. Heard in the Court of Appeals 23 August 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.*

*Lisa A. Bakale-Wise for defendant.*

BERGER, Judge.

Kevin Darnell Guy ("Defendant") appeals from his convictions for robbery with a dangerous weapon, possession of stolen goods, and simple possession of marijuana. Defendant asserts that (1) his right to confront the witnesses against him under the Sixth Amendment of the United States Constitution was violated; (2) the trial court erred in denying his motions to dismiss; (3) the trial court failed to intervene *ex mero motu* when the prosecutor made references to Defendant's gang affiliation during closing arguments; (4) the trial court erred in instructing the jury on acting in concert; and (5) his constitutional protection from double jeopardy was violated when the trial court sentenced him for both robbery with a dangerous weapon and possession of stolen goods. We review each argument in turn.

Factual and Procedural Background

On November 3, 2015, Joseph Ray ("Ray"), now deceased, went to an ATM to withdraw money, but was unsuccessful because his disability check had not yet been deposited. Upon returning around 1:20 a.m. to his home in Colonial Mobile Home Park in Butner, North Carolina, he was robbed of his debit card at gunpoint.

His mother, Shirley P. Spalding ("Spalding"), testified that Ray entered the home "pale as a ghost" and "shaking real bad." He was "stuttering his words," but was able to say "I got robbed." He further relayed to her that a man had put a gun to his head while another individual wearing a clown mask was standing in front of him. After Ray told the individuals that he had no cash but had his debit card, they took his debit card and fled the scene in a car.

Ernest Pipkin ("Pipkin") was inside Ray's home at the time of the robbery. Pipkin testified that, as he walked out of the mobile home, he saw "a car fly by" and "jump the hump" of a large speed bump on the road that ran through the mobile home park. Pipkin testified that he thought one of the tires on the car "caught a flat" because he heard a loud "pow" when the car hit the speed bump.

Butner Public Safety Officer Kevin Rigsby ("Officer Rigsby") was on patrol that night with three other officers when they received a report from 911 communications that an armed robbery had just taken place and that the suspects had not been apprehended. When Officer Rigsby

arrived at Ray's home, Ray was "very shaken up, he was fumbling over his words and talking so fast, it sounded like he was speaking another language." Officer Rigsby further testified that:

> [Ray] said that a silver -- It was four black subjects, four black males is what he thought robbed him and one of them had a short snubnosed revolver to the back of his head . . . [and] [a]t that time the only information he provided was that a silver car fled toward East C Street, and that he wasn't sure if all three subjects got into the vehicle or not. The only clothing description he gave me was that one of the subjects that he saw run around the 90 degree turn in the mobile home park back toward the get away car was wearing red. He couldn't tell me whether it was a red hat, red pants, he just said red.

As Officer Rigsby was speaking with Ray, he heard on his radio that Officer Cecilia Duke ("Officer Duke") had located a vehicle and suspects, which matched the description provided by the Sheriff's Department, less than a quarter-mile away from Ray's residence.

Officer Rigsby immediately left Ray to assist Officer Duke. He considered the ongoing search an "emergency situation" because "[i]t was known that the robbery included handguns and [O]fficer Duke was by herself with three to four possible subjects." When Officer Rigsby arrived at Piedmont Village, he saw Defendant changing a tire on the vehicle; a suspect wearing a red ball cap, a gray t-shirt, red pants and red shoes; and a female suspect. Officer Rigsby also observed a black mask in the open trunk of the silver car which was similar to the mask described by Ray. Defendant admitted that the silver car was his. Once the suspects had been detained, Officer Rigsby canvassed the area and found a loaded snubnosed revolver fifteen to twenty feet away from Defendant's car. Officer Duke also found Ray's stolen debit card and a bag of marijuana near the handgun.

On December 7, 2015, Defendant was indicted for possession of a firearm by a felon; robbery with a dangerous weapon; possession of stolen goods; possession with intent to manufacture, sell, or deliver marijuana; keeping or maintaining a vehicle for the keeping or sale of marijuana; and possession of a stolen firearm. On August 16, 2017, Defendant filed a motion to suppress statements made by the victim shortly after the alleged robbery. Before his trial began, Defendant's motion to suppress was denied and the charges of possession of a firearm by a felon and possession of a stolen firearm were dismissed.

On August 23, 2017, Defendant was convicted of robbery with a dangerous weapon, possession of stolen goods, and possession of marijuana. Defendant was found not guilty of maintaining or keeping a vehicle for the keeping or selling of marijuana. He was sentenced to a term of 96 to 128 months in prison for his conviction of robbery with a dangerous weapon and concurrent terms of sixty days for possession of stolen goods and possession of marijuana.

**[1]** Defendant gave notice of appeal on August 24, 2017. On September 6, 2017, Defendant filed a pro se notarized, handwritten "Motion for Appeal" with the Granville County Superior Court, but failed to serve his motion on the State.

"A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2017). "[A] jurisdictional default, such as a failure to comply with Rule 4 precludes the appellate court from acting in any manner other than to dismiss the appeal." *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (citation and quotation marks omitted). However, a writ of certiorari may be issued "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1) (2017). The power to do so is discretionary and may only be done in "appropriate circumstances." *Id.* We grant Defendant's petition for a writ of certiorari and now address the merits. We find no error in part, arrest judgment in part, and remand for sentencing in part.

## Analysis

### I. Sixth Amendment Right to Confront Witnesses

**[2]** Defendant first asserts that the trial court erred by allowing Officer Rigsby to testify about statements made to him by Ray after the robbery but before Defendant had been apprehended. He argues this violated his Sixth Amendment right to confront the witness against him. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless [we find] that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2017).

"The Confrontation Clause of the Sixth Amendment prohibits admission of "testimonial" statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness." *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004)). In this context, testimonial means "at a minimum[,] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements given in] police interrogations." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. Additionally,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

"In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances." *Michigan v. Bryant*, 562 U.S. 344, 369, 179 L. Ed. 2d 93, 114 (2011). Factors for the courts to consider include:

> (1) the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred; (2) objective determination of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement.

*Glenn*, 220 N.C. App. at 26, 725 S.E.2d at 61 (citation and quotation marks omitted).

Here, Ray's statements to Officer Rigsby were made in an effort to assist in the apprehension of armed suspects. When Officer Rigsby arrived at Ray's home to investigate the robbery call, the armed suspects had not been found, and Ray was "very shaken up, was fumbling over his words and talking so fast, it sounded like he was speaking another

language." Once Ray had calmed down, he informed Officer Rigsby that a group of black males had robbed him, that one of them had put a snub-nosed revolver to the back of his head, and that another had worn a clown mask, and that the suspects had fled in a silver car. Ray also provided information that one of the individuals involved in the robbery had on red apparel.

Shortly after Ray had made these statements, Officer Duke informed Officer Rigsby that she had found the vehicle and suspects matching the description provided by 911 communications. Officer Rigsby immediately left Ray to assist Officer Duke because "[i]t was known that the robbery included handguns and [O]fficer Duke was by herself with three to four possible subjects."

Even though the suspects had already fled Ray's home, there was still an ongoing emergency that posed danger to the public. Under these circumstances, Ray's statements to Officer Rigsby were nontestimonial because they were provided in an effort to assist police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects. The Confrontation Clause of the Sixth Amendment only applies to testimonial statements and, so, does not bar the introduction of Ray's statements to Officer Rigsby. Therefore, the trial court did not err in allowing Ray's statements to be admitted into evidence.

II. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss each of the charges against him. We discuss each charge in turn.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

A. Robbery with a Dangerous Weapon

**[3]** Defendant contends the trial court erred in denying his motion to dismiss the robbery charge because the evidence failed to show that Defendant either committed the robbery himself or acted in concert with the actual perpetrators. We disagree.

"The essential elements of the crime of robbery with a dangerous weapon, or armed robbery, are: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Sullivan*, 216 N.C. App. 495, 501-02, 717 S.E.2d 581, 585-86 (2011) (purgandum[1]).

In the commission of a crime, to prove that a defendant was acting in concert,

> [i]t is not . . . necessary for a defendant to do *any particular act* constituting at least part of a crime in order to be convicted of that crime under the concerted action principal so long as (1) he is present at the scene of the crime and (2) the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

*State v. Williams*, 299 N.C. 652, 656-57, 263 S.E.2d 774, 778 (1980) (citation omitted). "If two or more persons join in a purpose to commit robbery with a dangerous weapon, each of them, if actually or constructively present, is guilty of that crime if the other commits the crime, if they shared a common plan to commit that offense." *State v. Hill*, 182 N.C. App. 88, 92, 641 S.E.2d 380, 385 (2007).

"While actual distance from the crime scene is not always controlling in determining constructive presence, the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *State v. Buie*, 26 N.C. App. 151, 153, 215 S.E.2d 401, 403 (1975) (citations omitted). Furthermore, "[t]he theory of acting in concert does not require an express agreement between the parties.

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

All that is necessary is an implied mutual understanding or agreement to do the crimes." *Hill*, 182 N.C. App. at 93, 641 S.E.2d at 385 (2007) (citation omitted).

In the present case, even though Defendant was not identified at the scene of the crime, the jury could have made reasonable inferences from the evidence that Defendant acted in concert to commit robbery with a dangerous weapon. At trial, Pipkin, who was at the scene of the crime, testified that he saw a car fly by him and heard that same car hit a large speed bump and blow out a tire as it was fleeing. The Granville County Sherriff's Department reported a silver car was involved in an armed robbery involving three to four suspects. Officer Duke testified that less than a minute after receiving the 911 communication over the radio, she found Defendant changing a flat tire on his vehicle, along with two other individuals, less than a quarter mile away from the scene of the crime. Additionally, Ray's debit card was found in close proximity to Defendant's vehicle where Defendant was changing the flat tire. The mask, snubnosed revolver, and the suspect wearing a red hat and red clothing all matched the descriptions provided by Ray and were located or recovered at or near Defendant's vehicle.

When viewed in the light most favorable to the State, substantial evidence was introduced at trial sufficient to support a reasonable inference that Defendant acted in concert to commit robbery with a dangerous weapon. Therefore, the trial court did not err by denying Defendant's motion to dismiss the robbery with a dangerous weapon charge.

B. Possession of Stolen Goods and Possession of Marijuana

**[4]** Defendant argues that the trial court erred in denying his motions to dismiss the felony charges of possession of stolen goods and possession of marijuana because he never had actual or constructive possession of the stolen debit card or the marijuana. We disagree.

The elements of the crime of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (citation omitted). "[A] conviction for felonious possession of marijuana requires proof that defendant was in possession of more than one and one-half ounces (or approximately 42 grams) of marijuana." *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 476 (2010) (citation and quotation marks omitted).

Our Supreme Court has explained what is necessary to prove possession:

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [contraband]. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [contraband] [is] found, the State must show other incriminating circumstances before constructive possession may be inferred.

*State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (citations and quotation marks omitted). "Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*." *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (citation omitted), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002).

This court has previously found incriminating circumstances sufficient to prove non-exclusive, constructive possession where there was: (1) evidence the defendant had a "specific or unique connection to the place where the [items] were found"; (2) evidence the defendant "behaved suspiciously, made incriminating statements . . . ., or failed to cooperate with law enforcement"; (3) indicia of the defendant's control over the place where the contraband was found; or (4) other incriminating evidence in addition to the fact that the items were located near the defendant. *Ferguson*, 204 N.C. App. at 460-64, 694 S.E.2d at 477-80 (2010) (citations omitted).

Here, the State presented substantial evidence that tended to establish that Defendant had constructive possession of both the debit card and the marijuana. The debit card with Ray's name on it and the marijuana were both found in close proximity to Defendant and his car, which he admitted he owned. Because of their proximity to the debit card and marijuana, Defendant and those with whom he acted in concert had the

ability to exercise control over the contraband. Additionally, Officer Duke spotted Defendant's car and the suspects about one minute after receiving information from the Granville County Sheriff's Department. The brief period of time between the robbery and the locating of the suspects with the stolen debit card supports an inference that Defendant had knowledge of the robbery and the presence of Ray's debit card.

Based upon the totality of the circumstances, there was substantial evidence from which a reasonable juror could conclude that Defendant had constructive possession of both the debit card and the marijuana. The "evidence is for the jury to weigh, not the trial court, and it is certainly not for the appellate courts to reweigh . . . [because] [w]hen a trial court rules on a motion to dismiss, the court gives considerable deference to the State's evidence." *State v. Chekanow*, 370 N.C. 488, 499, 809 S.E.2d 546, 554 (2018) (*purgandum*). Therefore, the trial court did not err in denying Defendant's motion to dismiss because the State introduced sufficient incriminating circumstances to prove that Defendant had constructive possession of both the stolen debit card and the marijuana.

III. Closing Arguments

**[5]** Defendant next argues that the trial court abused its discretion in failing to intervene *ex mero motu* when the State referred to Defendant's gang ties in its closing argument. We disagree.

North Carolina General Statute § 15A-1230(a) provides that in closing arguments,

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2017).

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted). "In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have

intervened on its own accord." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citation omitted).

"[W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179, 804 S.E.2d at 469. Our Supreme Court explained:

> [A]lthough control of jury argument is left to the discretion of the trial judge, trial counsel must nevertheless conduct themselves within certain statutory parameters. It is improper for lawyers in their closing arguments to become abusive, inject their personal experiences, express their personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record. Within these statutory confines, we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.
>
> If an argument is improper, and opposing counsel fails to object to it, the second step of the analysis requires a showing that the argument is *so grossly* improper that a defendant's right to a fair trial was prejudiced by the trial court's failure to intervene. Our standard of review dictates that only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. It is not enough that the prosecutors' remarks were undesirable or even universally condemned. For an appellate court to order a new trial, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

*Id.* at 179-80, 804 S.E.2d at 469-70 (*purgandum*).

Here, Defendant challenges the following statements made by the State during closing arguments:

> I contend to you that they're gang members from Durham, and when he says he is like his big brother, I'll bet he is. He's his big brother gang member and they're going to do anything to protect their gang member. Because they got caught. And they have nothing to lose. They're pulling their time, now. But they want to help their gang member buddy out. And that's why they got up here and told so many lies, to help their big brother gang member out. We have to figure what kind of society and what kind of county we want to live in. Do want to live somewhere where gang people from Durham can come and rob a little old man who didn't have anything. He gave them all that he [had] which was the debit card, but there wasn't any money in his account because he hadn't even gotten his disability check. Is that the kind of county and society we want to live in?

Defendant called co-defendants John Morrell III and Tyquon Smith as witnesses. Both testified they were gang members, and Smith admitted that he was in the same gang as Defendant. The two admitted they did not live in Butner, and John Morrell stated they drove to Butner from Durham on the night of the robbery.

The prosecutor's statements here merely commented on the evidence presented by Defendant at trial, i.e., Defendant and his associates were Durham gang members. Also, the State's argument did not center around Defendant's gang-involvement. The prosecutor's only reference to gang-involvement was in one paragraph during her entire closing argument. As such, in light of the overall factual circumstances, the prosecutor's reference to Defendant's gang membership did not infect "the trial with unfairness [such] that they rendered the conviction fundamentally unfair." *Waring*, 364 N.C. at 500, 701 S.E.2d at 650 (citation omitted). Moreover, the prosecutor's commentary on the evidence has not been shown to be "calculated to lead the jury astray." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107-08. Instead, the prosecutor's statements were supported by the evidence introduced by Defendant at trial, and in light of the evidence presented at trial, were not improper.

In addition, "[t]his Court has consistently held that a prosecutor may argue that a jury is the voice and conscience of the community . . . and [a] prosecutor may also ask the jury to send a message to the community regarding justice." *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (*purgandum*). Here, the prosecutor ended her argument by urging the jury to be the voice and conscience of Granville

County by thinking about "the kind of county and society we want to live in." The prosecutor's argument was simply a reminder to the jury that they should carefully consider their duties and responsibilities as jurors, and that the quality of justice in Granville County ultimately rests with citizens who properly perform their function as jurors. Because the prosecutor's statements during closing arguments were not improper, we find no error.

IV. Jury Instruction

**[6]** Defendant argues that the trial court committed plain error by instructing the jury on "acting in concert" because it was unsupported by the evidence and directly impacted the jury's decision to convict. We disagree.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). Defendant concedes that he failed to object at trial, but specifically argues plain error on appeal.

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Plain error review "requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

"Under the doctrine of acting in concert, if two or more persons are acting together in pursuance of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuance of the common plan." *State v. Barts*, 316 N.C. 666, 688-89, 343 S.E.2d 828, 843 (1986); *State v. Williams*, 299 N.C. 652, 656-57, 263 S.E.2d 774, 777-78 (1980). Even if the Defendant had timely objected to the acting in concert jury instruction, the instruction was supported by the evidence and did not amount to error.

Here, Defendant and two others were located approximately a quarter-mile from the location where the robbery took place. Defendant was changing a tire on a car that matched the description of the vehicle in which the robbers had fled the scene and a witness heard a tire blew out. Defendant had a mask in his vehicle that matched the description of the mask used in the robbery; the victim's stolen debit card was located in close proximity to Defendant, as was a snubnosed revolver similar to the one used in the robbery.

Again, Pipkin testified that he saw a car fly by him and heard that same car hit a large speed bump as it was fleeing. Officer Duke found Defendant changing a flat tire of a car less than a quarter mile away from the scene of the crime after hearing the 911 communications report that a silver car was involved in an armed robbery. In addition, the snubnosed handgun reported to have been used at the scene of the crime was about fifteen feet from Defendant's car.

Even if Defendant was not the person who had robbed Ray of his debit card, there was substantial evidence that in the early morning hours of November 3, 2015, Defendant was aiding or otherwise assisting others in a common plan or purpose to rob Ray and flee the scene. Thus, an acting in concert instruction was supported by the evidence, and, therefore, the trial court did not err in giving this instruction. Because Defendant has not shown that the trial court erred in giving the acting in concert instruction, he cannot show plain error.

V. Double Jeopardy

**[7]** Defendant argues, for the first time on appeal, that he was improperly sentenced for both robbery with a dangerous weapon and possession of stolen goods, when the latter involved proceeds from the former, in violation of the Constitution's prohibition against double jeopardy. Defendant concedes that he failed to object at sentencing on double jeopardy grounds.

"A defendant's failure to object below on constitutional double jeopardy grounds typically waives his or her right to appellate review of the issue. . . . Further, our Rules of Appellate Procedure require a defendant to make a timely request, objection, or motion below, stating the specific grounds for the desired ruling in order to preserve an issue for appellate review." *State v. Harding*, ___ N.C. App. ___, ___, 813 S.E.2d 254, 261 (*purgandum*), *disc. review denied*, ___ N.C. ___, 817 S.E.2d 205 (2018). However, if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally

imposed, or is otherwise invalid as a matter of law," it may be subject to appellate review even though no objection, exception or motion was made at trial. N.C. Gen. Stat. § 15A-1446(d)(18) (2017). We address the merits of defendant's arguments and arrest judgment for his conviction of possession of stolen goods.

"[T]he Legislature created the statutory offense of possession of stolen goods as a substitute for the common law offense of larceny in those situations in which the State could not provide sufficient evidence that the defendant stole the property at issue." *State v. Moses*, 205 N.C. App. 629, 640, 698 S.E.2d 688, 696 (2010) (citation omitted). In light of this determination, "the Legislature also did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery." *Id.* The "[p]rinciples of legislative intent . . . proscribe punishment for possession during the course of the same conduct, and where the property is the same property." *State v. Hendricksen*, ___ N.C. App. ___, ___, 809 S.E.2d 391, 395 (citation and quotation marks omitted), *review denied*, ___ N.C. ___, 812 S.E.2d 856 (2018).

In the present case Defendant was convicted of robbery with a dangerous weapon, possession of stolen goods, and possession of marijuana. Defendant's convictions for possession of stolen goods and possession of marijuana were consolidated and that sentence was to run concurrently with the robbery with a dangerous weapon sentence. However, in light of *Moses* and *Hendricksen*, we are required to arrest judgment on Defendant's sentence for possession of stolen goods.

**[8]** Furthermore, Defendant's conviction of misdemeanor possession of stolen goods was consolidated with his conviction of misdemeanor possession of marijuana, which required him to serve a sentence of 60 days in custody. Possession of less than one-half ounce of marijuana is a Class 3 misdemeanor. N.C. Gen. Stat. § 90-95(d)(4). A defendant with a prior record level III convicted of a Class 3 misdemeanor can only be sentenced to a maximum of 20 days in custody. N.C. Gen. Stat. § 15A-1340.23(c). Because we arrested judgment for possession of stolen goods, we remand for the resentencing of Defendant's conviction of possession of marijuana.

## Conclusion

The trial court properly admitted Ray's statements because they were nontestimonial. The trial court properly denied Defendant's motions to dismiss because the State presented substantial evidence of each element to support a conviction for each offense. The trial court

did not abuse its discretion by not intervening *ex mero motu* during the prosecutor's closing statements because there was nothing improper about the prosecutor's closing arguments. The trial court did not err in instructing the jury on acting in concert because the instruction was supported by the evidence introduced at trial. We arrest judgment on Defendant's conviction for possession of stolen goods, and remand for resentencing on the possession of marijuana conviction.

NO ERROR IN PART; ARREST JUDGMENT IN PART; REMANDED IN PART.

Judges DIETZ and TYSON concur.

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STATE OF NORTH CAROLINA
v.
EUGENE OLIVER JACKSON, DEFENDANT

No. COA18-417

Filed 6 November 2018

**Search and Seizure—probable cause—search incident to arrest—open container—expired license**

In a prosecution for possession of cocaine and driving without a license, the trial court properly denied defendant's motion to suppress drugs found on his person during a traffic stop, based upon sufficient evidence and findings of fact that after defendant was stopped for running a red light, the law enforcement officer observed an open container of alcohol in the vehicle and discovered that defendant was driving without a valid driver's license. Although the trial court ruled that the officer had a reasonable suspicion which justified extending the traffic stop, the officer did not need reasonable suspicion where probable cause arose during the stop to search defendant's person and arrest him.

Appeal by defendant from judgment entered 13 June 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 2 October 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jarrett W. McGowan, for the State.*

*David Weiss for defendant.*

BERGER, Judge.

Eugene Oliver Jackson ("Defendant") was indicted for felony possession of cocaine and driving without an operator's license. Defendant filed a motion to suppress, arguing the arresting officer lacked reasonable suspicion to justify the traffic stop. Defendant's motion to suppress was denied. On June 13, 2017, Defendant pleaded guilty to felony possession of a schedule II substance and driving without an operator's license. Defendant appeals arguing that his motion to suppress should have been granted because the arresting officer did not have reasonable suspicion to justify extending the traffic stop. Defendant also contends that the trial court erred in concluding the contraband seized from Defendant's person would have been ultimately or inevitably discovered through lawful means. We disagree.

Facts and Procedural Background

In the order denying Defendant's motion to suppress, the trial court found: On February 14, 2015, City of Winston-Salem Police Department Corporal J.B. Keltner ("Corporal Keltner"), who had more than sixteen years of experience in law enforcement, including training in narcotics investigation and highway interdiction, was on the lookout for a gold Kia sedan in connection with an earlier incident that occurred at the Green Valley Inn. As Corporal Keltner was monitoring the intersection of Patterson Avenue and Germanton Road, he observed a Kia sedan drive through the red light on Patterson Avenue approaching Highway 52 North. Corporal Keltner conducted a traffic stop. The Kia, driven by Defendant, stopped on the right hand side of the highway, but with its two left tires on the outside right fog line. Based on Corporal Keltner's training and experience, persons transporting narcotics sometimes engaged in the practice of "white lining," or parking on the white fog line to make approaching the vehicle and conducting investigations more difficult.

Corporal Keltner approached the passenger side of the vehicle, and immediately "observed a 24-oz. beer, open, in the center console." Defendant then rolled down the window and Corporal Keltner explained that he stopped the vehicle for running the red light, to which Defendant made spontaneous comments about a friend running off and not knowing the friend's location. Corporal Keltner then asked for his license and registration. Defendant responded that he did not have a license, but

handed Corporal Keltner a Pennsylvania State I.D. card with his right hand, which was "shaky."

After noticing that Defendant "had red glassy eyes" and "a moderate odor of alcohol coming from the car," Corporal Keltner asked Defendant to exit the car so that he could search the car and have Defendant perform sobriety tests. Before searching the car, Corporal Keltner frisked Defendant for weapons. Upon searching the vehicle, Corporal Keltner found no further evidence or contraband. As Corporal Keltner returned to his police car to check the status of Defendant's license and for any outstanding warrants, "[D]efendant spontaneously handed" Corporal Keltner his car keys. Because it was cold outside, Corporal Keltner permitted Defendant to sit in the back of the patrol car un-handcuffed while he ran license and warrant checks. Corporal Keltner determined Defendant's license was expired, the Kia was not registered to Defendant, and Defendant had no outstanding warrants.

While Corporal Keltner was sitting with Defendant in his patrol car, Defendant voluntarily "made a variety of spontaneous statements to Corp[oral] Keltner about his missing friend, first saying he could not remember the friend's name, then that his name was "Ty," then "Ty Payne," and then that "Ty was in fact his brother-in-law." Defendant further asked if "he could give him a ride back to the Green Valley Inn after the traffic stop was finished."

After concluding his license and warrant check, Corporal Keltner conducted standardized field sobriety tests, which were performed to his satisfaction. Corporal Keltner then requested and received consent to search Defendant and found powder cocaine and crack cocaine in Defendant's pockets. Defendant was arrested for possession of cocaine and driving without an operator's license.

The trial court further found that Corporal Keltner would not have allowed Defendant to drive away from the traffic stop because he had no driver's license; and he would have searched Defendant's person before transporting Defendant in his patrol car to any other location or prior to arresting him. Corporal Keltner testified that it was his practice to search all persons who rode in his patrol car, even if not under arrest, for safety reasons and to avoid unwittingly transporting contraband.

Defendant was indicted for possession of cocaine and driving without an operator's license, and in February 2016, he filed a motion to suppress. The trial court denied Defendant's motion to suppress in an order filed on July 24, 2017. On June 13, 2017, Defendant pleaded guilty to felony possession of a schedule II substance and driving without an

operator's license. Defendant was placed on supervised probation for eighteen months.

Defendant appealed the trial court's denial of his Motion to Suppress, but did not give notice of his appeal from the underlying judgment. As a result, Defendant petitioned this Court on May 23, 2018 for a writ of certiorari in light of the defect in his notice of appeal. Defendant asserts that the trial court erred in denying the Motion to Suppress because the arresting officer's reason for extending the traffic stop failed to distinguish Defendant from other innocent travelers and did not establish reasonable suspicion. We grant Defendant's petition for a writ of certiorari, and address the merits.

Analysis

Defendant argues that Corporal Keltner lacked reasonable suspicion to extend the stop after determining Defendant was not intoxicated. He further argues that the State failed to prove discovery of the cocaine was inevitable. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The conclusions of law . . . are reviewed *de novo*." *State v. Downey*, ___ N.C. App. ___, ___, 796 S.E.2d 517, 519 (2017), *aff'd*, 370 N.C. 507, 809 S.E.2d 566 (2018).

Here, the trial court's findings of fact were supported by competent evidence. Based upon those findings, the trial court concluded as a matter of law that "the purpose of the traffic stop was concluded after the field sobriety tests were administered, and before Corp[oral] Keltner requested consent to search [D]efendant's person." However, "based on the totality of the circumstances Corpor[al] Keltner had reasonable articulable suspicion to extend the stop for the purpose of asking for consent to search the [D]efendant's person." The factor's supporting Corporal Keltner's reasonable suspicion to extend the stop for the purpose of asking consent to search Defendant's person included:

> [D]efendant's nervousness and shakiness, the vehicle being registered to a third party not present, the [D]efendant presenting an out-of-state identification; the [D]efendant giving conflicting information about where he lived; the [D]efendant's repeated offering of unsolicited information

> about a missing friend and conflicting information about the name of the friend while ultimately volunteering that the friend was in fact his brother-in-law; and the [D]efendant's parking the vehicle on the fog line where officers could not approach the driver's side of the vehicle without having to stand in the lane of travel.

The trial court also concluded that Defendant's "consent to the search of his person was voluntarily given," and that Defendant "suffered no constitutional violations as a result of this stop and search." Moreover, the trial court stated that, even if Defendant had not consented to the search of his person,

> the drugs located on [D]efendant's person would have been inevitably discovered: if Corp[oral] Keltner had merely written [D]efendant a citation and given [D]efendant the ride he had requested following the completion of the traffic stop, and searched him prior to that ride as was Corp[oral] Keltner's practice, the drugs would have been located at that point; or, they would have been located pursuant to a search incident to arrest for No Operator's License.

I. Reasonable Suspicion

The Fourth Amendment of the United States protects individuals "against unreasonable searches and seizures." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing U.S. Const. amend. IV. and N.C. Const. art. I, § 20). A traffic stop is constitutional if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Id.* at 246, 658 S.E.2d at 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Bullock*, 370 N.C. 256, 261, 805 S.E.2d 671, 676 (2017) (citation and quotation marks omitted).

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (quoting *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576). Reasonable suspicion requires "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Fields*, 219 N.C. App. 385, 387, 723 S.E.2d 777, 779 (2012) (citation and quotation marks omitted). "[T]he stop [must] . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through

the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439-40 (2008) (citation omitted). "[T]he overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances." *Fields*, 219 N.C. App. at 387, 723 S.E.2d at 779 (citation and quotation marks omitted).

In the present case, Corporal Keltner had reasonable suspicion to conduct a traffic stop because he had witnessed Defendant run a red light. Defendant concedes the initial reason for stopping Defendant was lawful, but contends Corporal Keltner did not have reasonable suspicion to search Defendant's person once the purpose of the traffic stop was concluded. However, Corporal Keltner did not need reasonable suspicion to extend the stop because probable cause developed to justify Defendant's arrest.

Even if we were to accept Defendant's argument that Corporal Keltner lacked reasonable suspicion to extend the stop, the trial court's ultimate ruling on Defendant's motion to suppress the admission of cocaine is properly upheld. *See State v. Hester*, ___ N.C. App., ___, ___, 803 S.E.2d 8, 15-16 (2017) (citations and quotation marks omitted) ("A correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned.").

Based on the trial court's findings and Corporal Keltner's testimony at the suppression hearing and at trial, two intervening events, i.e., discovery of the open container and determination that Defendant was driving the vehicle without an operator's license, provided Corporal Keltner probable cause to search Defendant's person and arrest him.

II. Probable Cause

An officer may lawfully "arrest without a warrant any person who the officer has probable cause to believe" has committed a criminal offense. N.C. Gen. Stat. § 15A-401(b)(2) (2017).

> Probable cause is defined as those facts and circumstances within an officer's knowledge . . . which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. The Supreme Court has explained that probable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. A probability of illegal activity, rather than a *prima facie* showing of illegal activity or proof of guilt, is sufficient.

*State v. Robinson*, 221 N.C. App. 266, 272-73, 727 S.E.2d 712, 717 (2012) (*purgandum*[1]). Additionally, "[p]robable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information[,] which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Biber*, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (citation and quotation marks omitted).

> To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is not a high bar.

*District of Columbia v. Wesby*, ___ U.S. ___, ___, 199 L. Ed. 2d 453 (2018) (citations and quotation marks omitted).

Here, two intervening events gave Corporal Keltner probable cause to search and arrest Defendant. When Corporal Keltner approached Defendant's vehicle he "immediately noticed a[n] [open] 24-ounce Bush [sic] beer can that was sitting in the center console of the drink holder." Defendant then rolled down the window and Corporal Keltner detected an odor of alcohol, observed Defendant's glassy eyes, and explained that he stopped the car for running the red light, to which Defendant made spontaneous comments about a friend of his having run off and not knowing where the friend was. Corporal Keltner then asked for his license and registration. Defendant responded that he did not have a license and handed Corporal Keltner a Pennsylvania State I.D. card. Corporal Keltner determined that Defendant's license was expired and Defendant had no outstanding warrants.

In light of these facts, Corporal Keltner could have arrested Defendant for either driving with an open container or driving without

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

a valid operator's license at that time. N.C. Gen. Stat. § 20-138.7(a)(1) (2017); N.C. Gen. Stat. § 20-35 (2017). The probable cause to arrest justified extension of the encounter between Corporal Keltner and Defendant. Corporal Keltner merely asked for consent to do that which by law he was authorized to do: conduct a search of Defendant's person.

"An officer may conduct a warrantless search incident to a lawful arrest. A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause." *Robinson*, 221 N.C. App. at 276, 727 S.E.2d at 719 (*purgandum*).

> If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

*State v. Wooten*, 34 N.C. App. 85, 89-90, 237 S.E.2d 301, 305 (1977).

In the present case, because an independent basis for probable cause existed prior to the search of Defendant's person and because the independent basis was separate and apart from discovery of the cocaine, the cocaine found on Defendant's person was unnecessary to establish probable cause for arrest.

Moreover, Corporal Keltner testified that prior to asking Defendant for consent to search his person, he believed that Defendant was engaging in some sort of criminal activity other than just running a red light or impaired driving, or driving without a valid operator's license. Corporal Keltner testified that:

> a lot of times individuals that are involved in some sort of criminal activity or have some type of contraband in their car will commonly do what we refer to in highway interdiction as white line the officer whenever they stopped, because a lot of officers traditionally will make their approach to the vehicle on the driver's side of the vehicle, and by pulling over there on the fog line, would expose the officer to danger, walking up in the travel lane and sometimes force the officer to change the way he does

> the traffic stop, or just go ahead and hurry them on their way just to get out of that danger . . .
>
> [W]hen [Defendant] handed me his Pennsylvania . . . I.D. card, that his left -- or his right hand, rather, was shaking uncontrollably whenever he handed the license to me. I know, based on my training and experience, that individuals that are involved in criminal activity commonly will shake uncontrollably like that whenever they hand me their documentation that I have asked for in a traffic stop. . . .
>
> When he was sitting in the back of my patrol vehicle, just the spontaneous conversation that he initiated with me in regards to an event that had transpired prior to me stopping him and this individual that was involved in the -- the incident just seemed very strange to me that he's providing me with information that I hadn't asked for. And I noticed also that when he was talking to me that he was talking very, very rapidly. And I know both of these things, based on my training and experience, are things that are indications of people who are involved in criminal activities, are excessively nervous. . . .
>
> When I ran the registration, it was a North Carolina license plate that was displayed on this vehicle, I found that the vehicle was registered to a third-party female who was not present in the vehicle. And I know, based on my training and experience that very commonly individuals that are involved in criminal activities will . . . utilize a vehicle that's registered to a third party.

Thus, even though the trial court concluded that the traffic stop ended after the sobriety tests, Corporal Keltner developed probable cause to arrest Defendant and then to search Defendant's person. Because the search of Defendant's person was incident to a lawful arrest, the trial court's ruling on Defendant's motion to suppress was proper.

III. Consent

Defendant also contends his consent to the search was invalid because Corporal Keltner had not yet returned his car keys and I.D. card, and thus Defendant was not free to leave. Defendant relies on *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), which held that a defendant's consent to search is invalid when it is tainted by the illegality of an extended detention.

Under the search incident to arrest exception, consent to search is not required because "[a]n officer may conduct a warrantless search incident to a lawful arrest." *State v. Chadwick*, 149 N.C. App. 200, 205, 560 S.E.2d 207, 211 (2002) (citations omitted). "A search incident to lawful arrest is limited in scope to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him. The parameters of search incident to arrest in a given case depend upon the particular facts and circumstances." *State v. Jones*, 221 N.C. App. 236, 240, 725 S.E.2d 910, 913 (2012) (citation omitted).

Because probable cause existed, Defendant's consent was unnecessary for Corporal Keltner to conduct the search. No additional justification is needed beyond the probable cause required for the arrest. Additionally, the scope of the search was limited. Corporal Keltner conducted an outer clothing pat-down of Defendant's person. As a result of the pat-down, Corporal Keltner located powder cocaine and crack cocaine in Defendant's jeans. Once Corporal Keltner secured the cocaine he placed Defendant under arrest and concluded the search of Defendant's person. Thus, because Corporal Keltner had probable cause to arrest, Defendant's consent was not required to conduct a search incident to lawful arrest.

IV. Inevitable Discovery

Defendant further argues the trial court erred in alternatively concluding that discovery of the cocaine was inevitable. Even if we assume the search of Defendant was unlawful, which it was not, discovery of the illegal contraband on Defendant's person was inevitable.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). Under the exclusionary rule, evidence obtained by unreasonable search and seizure is generally inadmissible in a criminal prosecution. *State v. Garner*, 331 N.C. 491, 505-06, 417 S.E.2d 502, 510 (1992).

However, "[u]nder the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when the information ultimately or inevitably would have been discovered by lawful means. . . . Under this doctrine, the prosecution has the burden of proving that the evidence, even though obtained through an illegal search, would have been discovered anyway by independent lawful means." *State v. Harris*, 157 N.C. App. 647, 654, 580 S.E.2d 63, 67 (2003) (*purgandum*). "The State need not prove an ongoing independent investigation; we use a flexible

case-by-case approach in determining inevitability." *State v. Larkin*, 237 N.C. App. 335, 343, 764 S.E.2d 681, 687 (2014) (citation omitted). Moreover, "if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant." *Garner*, 331 N.C. at 508, 417 S.E.2d at 511.

In the present case, Corporal Keltner testified that had he merely issued Defendant a citation for driving with no operator's license, he "would [not] have allowed the [D]efendant to have driven off" from the traffic stop because "he was not licensed to operate a motor vehicle." Corporal Keltner further testified that he would have searched Defendant before giving him a ride or transporting him to jail because of his practice of searching everyone he transports in his patrol car. Also, Defendant repeatedly asked Corporal Keltner "if [h]e could give him a ride back over to the Green Valley Motel and drop him off."

Here, the State established by a preponderance of the evidence that the cocaine would have been inevitably discovered because Corporal Keltner would have searched Defendant's person for weapons or contraband prior to transporting him to another location or jail.

Conclusion

For the reasons stated above, the trial court properly denied Defendant's motion to suppress.

AFFIRMED.

Judges DIETZ and TYSON concur.

**STATE v. McNEIL**

[262 N.C. App. 340 (2018)]

STATE OF NORTH CAROLINA
v.
TEMAN TAVOI McNEIL, DEFENDANT

No. COA18-175

Filed 6 November 2018

**Sentencing—prior record level—possession of drug paraphernalia —pre-2014 conviction**

The State failed to carry its burden of proving at defendant's sentencing hearing that his pre-2014 conviction for possession of drug paraphernalia was a Class 1 misdemeanor counting as one point toward defendant's prior record level. Because the General Assembly in 2014 distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor (no points), from possession of paraphernalia related to other drugs, a Class 1 misdemeanor (one point), the State had to prove that the pre-2014 conviction was for non-marijuana paraphernalia in order to assign a point for that conviction. The matter was remanded for resentencing at the appropriate prior record level.

Appeal by Defendant from judgments entered 21 August 2017 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 19 September 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.*

*Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.*

MURPHY, Judge.

In criminal prosecutions, the State bears the burden of proving a defendant's prior record level. Since 2014, our General Assembly has distinguished possession of *marijuana* paraphernalia, a Class 3 misdemeanor, from possession of paraphernalia related to other drugs, a Class 1 misdemeanor. Where the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor. Upon careful review, we conclude the State failed to meet its burden to prove Defendant Teman Tavoi McNeil's 2012 "possession of

drug paraphernalia" conviction was related to a drug other than marijuana, and remand this case for resentencing at the appropriate prior record level.

## BACKGROUND

On 21 August 2017, Defendant, Teman Tavoi McNeil, was convicted of Non-Felonious Breaking or Entering, Felonious Larceny, and Felonious Possession of Goods Stolen Pursuant to a Breaking or Entering. During sentencing, the State argued Defendant was a prior record Level V with 14 points for felony sentencing purposes. Defendant did not stipulate to any of the underlying convictions or to his prior record level. The sole evidence the State presented at Defendant's sentencing hearing was a certified copy of his DCI Computerized Criminal History Report. The DCI Report lists all of Defendant's prior convictions, including the date, disposition, and docket number for each of Defendant's previous offenses. One listed offense is a 2012 conviction for Possession of Drug Paraphernalia in violation of N.C.G.S. § 90-113.22.

After hearing from both parties and reviewing Defendant's DCI Report, the Superior Court determined Defendant had 14 prior record points. This calculus included one point for Defendant's 2012 paraphernalia conviction, which the court calculated as a Class 1 misdemeanor. Consequently, the trial court assigned Defendant a prior record Level V, and sentenced him to an active sentence at the top of the aggravated range of 19 to 32 months imprisonment for felonious larceny. Had Defendant been sentenced with only 13 points, he would have been assigned a prior record Level IV and his maximum sentence for this class of felony would have been an active sentence of 14 to 26 months. N.C.G.S. § 15A-1340.17(c)-(d) (2017).

## ANALYSIS

The specific issue that we address for the first time in a published opinion[1] here is whether Defendant's 2012 conviction for possession of drug paraphernalia was correctly treated as a Class 1 misdemeanor for prior record level purposes. "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, 28 January 2010 Order (not published), 691 S.E.2d 414 (Mem) (2010). Additionally, "it is not necessary that an

1. *See State v. Dent*, No. COA17-857, 811 S.E.2d 247, 2018 WL 1386605, *6-*7 (N.C. Ct. App. Mar. 20, 2018) (unpublished); *State v. McCurry*, No. COA17-169, 806 S.E.2d 703, 2017 WL 5586601, *9-*10 (N.C. Ct. App. Nov. 21, 2017) (unpublished).

objection be lodged at the sentencing hearing" in order for the claim to be preserved for appeal. *Id.* The paraphernalia charge in question was counted as a Class 1 misdemeanor, but Defendant argues it should have been counted as a Class 3 misdemeanor and therefore excluded from his prior record level calculus. N.C.G.S. § 15A-1340.14(b)(5) (2017). We find Defendant's argument persuasive and remand for a new sentencing hearing with a prior record Level IV.

Defendant's prior offenses must be calculated according to their assigned classification as of February 2016, the date of Defendant's offenses in the immediate case. N.C.G.S. § 15A-1340.14(c) (2017) ("In determining [a defendant's] prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed."). Defendant was convicted for possession of drug paraphernalia in violation of N.C.G.S. § 90-113.22 on 13 March 2012. As of that date, N.C.G.S. § 90-113.22 was the sole criminal statute regarding all drug paraphernalia possession. However, in 2014 our General Assembly enacted N.C.G.S. § 90-113.22A, Possession of Marijuana Paraphernalia. N.C.G.S. § 90-113.22A (2017). As of the date of Defendant's offenses in this case, possession of *marijuana* paraphernalia was a Class 3 misdemeanor while possession of other drug paraphernalia remained a Class 1 misdemeanor. *Compare* N.C.G.S. § 90-113.22A *with* § 90-113.22. Thus, our determination of whether the trial court correctly calculated Defendant's prior record level is dependent upon whether Defendant's 2012 possession of paraphernalia conviction was related to marijuana or another drug, and whether the State met its burden of proving Defendant's prior record level.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . ." N.C.G.S. § 15A-1340.14(f) (2017). The existence of a prior conviction can be proven by stipulation, production of relevant records, or through "any other method found by the court to be reliable." *Id.* During the sentencing hearing, Defendant did not stipulate to his prior convictions, there was no specific mention of the paraphernalia charge, and the only evidence proffered by the State was a certified copy of Defendant's DCI Computerized Criminal History Report. The DCI Report is included in the Addendum to the Record on Appeal but sheds no light on whether Defendant's paraphernalia charge was related to marijuana or another drug. The DCI Report simply shows that Defendant was arrested and convicted for possession of drug paraphernalia in 2012. In sum, the State proved Defendant's record included a conviction for possession of drug paraphernalia,

but failed to prove whether that charge was related to marijuana or another drug, and therefore whether the conviction was for a Class 1 or Class 3 misdemeanor.

Reviewing the determination of Defendant's prior record level *de novo*, it is apparent the State failed to meet its burden of proving at the sentencing hearing that Defendant's prior conviction for possession of drug paraphernalia was a Class 1 misdemeanor. When the trial court fails to properly determine a defendant's prior sentencing level, the matter must be remanded for resentencing at the correct sentencing level. *See State v. Jeffery*, 167 N.C. App. 575, 582, 605 S.E.2d 672, 676 (2004) (remanding for resentencing where the State failed to prove the defendant's prior record level by a preponderance of the evidence). Therefore, this matter must be remanded and Defendant resentenced at the appropriate prior record level, IV.

## CONCLUSION

The State failed to prove Defendant's 2012 conviction for possession of drug paraphernalia was a Class 1 misdemeanor, but the trial court assigned one point to Defendant's prior record level for that conviction. That error resulted in Defendant being sentenced more harshly than he would have been under his proven prior record level. Therefore, this case must be remanded and Defendant resentenced as a prior record Level IV.

REMANDED FOR RESENTENCING.

Judges STROUD and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
STANLEY MELVIN MITCHELL

No. COA18-29

Filed 6 November 2018

**1. Search and Seizure—domestic violence visit—evidence discovered—warrant obtained**

The trial court did not err by denying defendant's motion to suppress evidence from an armed robbery discovered in a search of his home pursuant to a warrant obtained after officers saw the evidence during a domestic violence visit. Defendant did not object to officers entering his home; there was no merit to defendant's contention that the officers' entry into his home to investigate domestic violence was a mere subterfuge; and the officers did not participate in a warrantless search during the domestic violence visit because defendant's girlfriend merely showed the officers items she had discovered before the officers arrived.

**2. Evidence—identification of defendant—not impermissibly suggestive**

The trial court did not err by denying defendant's motion to suppress in- and out-of-court identification evidence under the totality of the circumstances. The evidence supported the trial court's findings that the authorities substantially followed statutory and police department polices in each photo lineup and that the substance of any deviation from those policies revolved around defendant's neck tattoos.

Appeal by defendant from judgment entered 6 October 2017 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.*

*Richard Croutharmel for defendant.*

ELMORE, Judge.

Defendant Stanley Melvin Mitchell entered an *Alford* guilty plea to robbery with a dangerous weapon following the trial court's denial of his motions to suppress evidence obtained from a search of his home as well as evidence of his identification by the robbery victim. Pursuant to the terms of his plea agreement with the State, defendant appeals the denial of his two motions. We affirm.

## I. Background

On 17 January 2014, Officers Nicole Saine and Marvin Francisco of the Charlotte-Mecklenburg Police Department (CMPD) responded to a report of domestic violence at the home defendant shared with his girlfriend, Kristy Fink. In addition to reporting the domestic violence incident, the 9-1-1 caller had further alleged that Ms. Fink suspected defendant of being involved in the armed robbery of a Game Stop store a few days prior to the incident.

The officers knocked on the front door upon arriving at the home, and defendant and Ms. Fink eventually answered and exited the home together. Pursuant to CMPD policy, the officers then separated defendant and Ms. Fink for questioning. Officer Saine remained outside the home with defendant, while Officer Francisco entered the home with Ms. Fink after being authorized by her to do so.

Inside the home, Ms. Fink confirmed that she had been assaulted by defendant; she also corroborated the 9-1-1 caller's allegation by telling Officer Francisco that the incident began when she confronted defendant about the robbery. Ms. Fink then led Officer Francisco to the shared upstairs bedroom to view potentially incriminating evidence she had found prior to the incident, which included money and clothing that matched the description of the robbery suspect's clothing. When Officer Saine entered the home at defendant's request for warmer clothing while he waited outside, Ms. Fink gave her the same information she had given Officer Francisco. The officers subsequently obtained a search warrant and conducted a search of the home based on the information provided by Ms. Fink.

On 12 May 2014, a grand jury indicted defendant for one count of robbery with a dangerous weapon. The State alleged that on 15 January 2014, defendant robbed a Game Stop store and threatened to use a firearm against an employee, Robert Cintron, in the commission of the robbery. Although Mr. Cintron had failed to identify any alleged perpetrator in a photographic lineup shown to him two days after the robbery, he later identified defendant when shown a single still-frame photograph obtained from the store's surveillance video. Mr. Cintron then identified

defendant as the perpetrator in the same photographic lineup shown to him two days after the robbery and again in four close-up, post-arrest photographs of defendant showing his neck tattoos.

Prior to trial, defendant filed a motion to suppress evidence obtained from the search of his home "because valid consent was not obtained" for the officers' initial entry into the home, and because the subsequent search warrant "was issued without probable cause and was invalid to authorize the search." Defendant also filed a motion to suppress both in-court and out-of-court identification by Mr. Cintron "of the defendant . . . as the person that robbed the Game Stop, because the out[-]of[-]court identification was so unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification and any in-court identification would not be independent in origin from the impermissible out-of-court identification." After a hearing in which Officer Saine, Officer Francisco, defendant, and Mr. Cintron testified, the trial court denied defendant's two motions in written orders entered 20 April 2017.

On 6 October 2017, defendant pled guilty to robbery with a dangerous weapon pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), as well as a plea agreement that preserved his right to appeal the trial court's denial of his motions to suppress. This appeal followed.

## II. Discussion

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). We review the trial court's conclusions of law *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

### A. Motion to Suppress Evidence Obtained from Search

**[1]** Defendant first contends the trial court erred in denying his motion to suppress evidence discovered in the search of his home "because it was obtained in violation of his constitutional rights to be free from unreasonable searches and seizures." According to defendant, the officers' initial entry into the home was illegal; thus, the fruits of the subsequent search should have been suppressed. We disagree.

Defendant relies primarily on the United States Supreme Court's holding in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), to support his argument that the officers were not justified in their initial

entry into his home. In *Randolph*, officers asked a married couple for permission to search their marital residence; one spouse refused permission, while the other spouse consented to the search. *Id.* at 107, 126 S. Ct. at 1519. The non-consenting spouse was later charged with possession of cocaine based on evidence the officers obtained during their search. *Id.* at 107-08, 126 S. Ct. at 1519-20. At trial, the non-consenting spouse moved to suppress the evidence as a "product[ ] of a warrantless search of his house unauthorized by his wife's consent over his express refusal." *Id.* The trial court denied the defendant's motion to suppress, holding that the consenting spouse "had common authority to consent to the search." *Id.* The Supreme Court disagreed, holding that "one occupant may [not] give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search." *Id.* at 108, 126 S. Ct. at 1520.

In response to defendant's argument, the State contends that *Randolph* is inapposite here for the reasons set forth in *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126 (2014). The Supreme Court refined *Randolph* in *Fernandez*, emphasizing that *Randolph*'s "holding was limited to situations in which the objecting occupant is physically present" and refusing to extend that holding "to the very different situation in [*Fernandez*], where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared." *Fernandez*, 571 U.S. at 294, 134 S. Ct. at 1130. We likewise conclude that *Randolph*'s holding does not extend to the facts of the instant case.

Here, the trial court made the following findings of fact in its order denying defendant's motion to suppress evidence obtained from the search of his home:

> 4. In order to fulfill their policy of separating the parties in domestic calls, Officer Saine stayed on the front steps with the defendant, and Officer Francisco was authorized by Miss Fink to enter the residence, where he conducted his original domestic disturbance interview of Miss Fink.
>
> . . . .
>
> 7. During Officer Francisco's investigation in the home with Miss Fink, the defendant was outside on the front steps with Officer Saine.
>
> 8. Although the defendant indicated that he wanted to be in the residence while any officers were in the residence,

the defendant never expressly refused permission of the officers to enter the residence themselves.

9. Officers did not conduct a warrantless search, but were simply shown evidence items by Miss Fink in support of her suspicion that the defendant committed the robbery, which had been the subject of the domestic altercation.

10. On the basis of the display of these items of possible evidence, the officers subsequently obtained a search warrant and conducted a search of the residence per search warrant duly obtained.

. . . .

14. Neither Officer Saine nor Francisco were sure if the defendant asked other officers who arrived later in the scene not to enter the residence, but the Court finds specifically, based on the totality of the circumstances, that in point of time [sic], had the defendant requested the later arriving officers not to enter the residence, this would have been after Kristy Fink had already told Francisco what she suspected about the robbery and after she had already displayed the potential robbery evidence to them.

. . . .

17. The defendant testified at the hearing and stated that Miss Fink had told him that she and Whitney, a friend [who defendant suspected as the 9-1-1 caller], had discussed Miss Fink's suspicion that the defendant had robbed the store in question.

Based on its findings of fact, the trial court concluded as a matter of law:

4. The police in this matter did not conduct a warrantless search of the residence, but were simply shown certain items of evidence of the robbery of a particular video game store possibly perpetrated by the defendant.

5. The defendant never expressly refused Officers Saine or Francisco to enter into the residence. He only indicated his desire to be present inside if and when the officers were inside the residence.

6. Miss Fink's statements to Officers Francisco and Saine during the initial domestic investigation, which concerned

possible implication of the defendant in a particular robbery, provided probable cause to them to obtain a search warrant and to arrest the defendant for the robbery.

[7]. These items of evidence displayed by Miss Fink to Officer Saine and Officer Francisco are not fruits of the poisonous tree and, therefore, are admissible.

[8]. Neither the defendant's constitutional nor statutory rights were violated herein.

Defendant specifically challenges finding no. 8 and conclusion no. 5—that defendant never objected to the officers entering his home—as "legally erroneous because [defendant] was tricked into believing the officers were not there to search his residence for evidence of crimes other than domestic violence." Defendant similarly challenges finding no. 9 and conclusion no. 4—that officers did not conduct a warrantless search of the residence. He asserts that "Officer Francisco's entry into the residence under the subterfuge of investigating a domestic violence complaint followed by his participation in a private search of [defendant's] bedroom and nightstand for evidence of a robbery was a warrantless search within the meaning of the Fourth Amendment." We disagree.

The trial court's finding and conclusion that defendant never objected to the officers entering his home is supported by Officer Saine's testimony that although defendant appeared "reluctant to stay outside" and "wanted to go back inside," defendant "did not state officers could not be in his residence." Like *Fernandez*, this is a very different situation from the one in *Randolph*, which involved a co-tenant "standing at the door and expressly refusing consent." *Randolph*, 547 U.S. at 119, 126 S. Ct. at 1526. Moreover, defendant's contention that the officers' entry into the home to investigate the allegations of domestic violence was a mere subterfuge to investigate the robbery is meritless. The evidence shows that the officers were dispatched to the home in response to a 9-1-1 call reporting an incident of domestic violence. When they arrived at the home, the officers separated the parties pursuant to CMPD policy, and Ms. Fink corroborated the information provided by the 9-1-1 caller. Finally, the evidence supports the trial court's finding and conclusion that officers did not participate in a warrantless search, where Ms. Fink simply showed the officers items she had discovered prior to their arrival at the home. *Cf. State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) ("Mere acceptance by the government of materials obtained in a private search is not a seizure so long as the materials are voluntarily relinquished to the government."). As defendant's contention that the subsequent search warrant was issued without probable cause and

was thus invalid to authorize the search assumes that the officers' initial entry into the home and gathering of information was unlawful, this argument is likewise overruled.

Because the trial court's findings of fact are supported by at least some competent evidence, and because those findings in turn support the trial court's conclusions of law, we hold that the trial court properly denied defendant's motion to suppress evidence obtained from the search of his home.

B. Motion to Suppress Identification Evidence

**[2]** In his second and final argument on appeal, defendant contends the trial court erred in denying his motion to suppress identification evidence "because the State conducted an impermissibly suggestive pretrial identification procedure that created a substantial likelihood of misidentification and violated [defendant's] right to due process." We disagree.

Here, the trial court made the following findings of fact in its order denying defendant's motion to suppress in-court and out-of-court identification evidence:

> 1. That on January 17, 2014, defendant was arrested for robbery of the GameStop store on January 15th, 2014. The alleged victim was shown six separate photos in a photo lineup on January 17, 2014, which was conducted substantially pursuant to procedures outlined in the statutes and the CMPD policies. However, the alleged victim failed to identify the defendant or any other alleged perpetrator during that photo lineup.
>
> 2. On February 18, 2015, in the course of trial preparation, the then assistant district attorney and two officers who had arrived at the scene of the alleged robbery on January 15, 2014, showed the alleged victim a single color photo, which is asserted by the affidavit of the defendant's counsel, upon information believed to be a single photo of one of the frames from the surveillance video, which the witness, that is, the alleged victim, identified as the defendant. This was the first time that the alleged victim identified the defendant. Thereupon, the alleged victim was shown the same or similar group of photos as the original photo lineup of January 17, 2014 and he identified the defendant as the perpetrator who was Number 3 in the course of that photo examination.

3. On March 21, 2017, again in trial preparation, the then assistant district attorney met with the alleged victim and showed multiple notes, which included four close-up post-arrest photos of the defendant showing his neck tattoos, and the victim again identified the defendant in the four photos as the alleged perpetrator.

. . . .

6. . . . [T]he alleged victim asserted that he could identify the defendant in the photo from the "creases in his forehead and tattoos."

7. The statutory and CMPD policy rules were primarily followed with some deviation in the photo lineups in this case, with the January 17, 2014, photo lineup almost precisely following the statutory and CMPD policy requirements.

8. The substance of any deviation from the statutory requirements and the CMPD policies revolved around the defendant's tattoos, and once the victim was shown close-up photos of defendant's tattoos, he made the identification in the matter.

Based on its findings of fact, the trial court concluded as a matter of law:

1. The authorities substantially followed statutory and CMPD policies in each photo lineup.

2. Any deviation was principally the result of earlier photos not portraying with sufficient clarity the defendant's tattoos, which the victim had observed at the alleged robbery.

3. This issue is why a less suggestive process could not be used and was not used, which would have comported more precisely with CMPD policy and the statute.

4. The totality of the facts and circumstances surrounding the question of any in-court or out-of-court identification of the defendant by the alleged victim is not unduly or impermissibly suggestive, and no less suggestive procedure could reasonably have been used by the authorities.

5. The procedures used by the authorities herein in regards to the identification question of the defendant did

> not give rise to a substantial likelihood that this defendant was mistakenly identified as the perpetrator allegedly in this case.

Defendant specifically challenges finding nos. 7 and 8 as well as conclusion no. 4—that the authorities substantially followed statutory and CMPD policies in each photo lineup, and that the substance of any deviation from those policies revolved around defendant's tattoos. He contends that "[t]he problem with that reasoning is that it assumes the police had their man and they merely needed confirmation from the witness." According to defendant, "[w]hen the assistant district attorney showed Mr. Cintron a single, color photo of Mr. Mitchell, he essentially told Mr. Cintron, 'This is the guy we think robbed the Game Stop store.' . . . . Such a procedure was inherently suggestive." Defendant ultimately challenges conclusion no. 5—that the procedures used by the authorities "did not give rise to a substantial likelihood that this defendant was mistakenly identified as the perpetrator." We disagree with defendant's argument.

A "show-up" identification is the practice of "showing suspects singly to persons for the purpose of identification, and not as part of a lineup[.]" *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981) (quotation marks omitted). As the State emphasizes here, the suggestive nature of show-ups is not fatal to their admissibility at trial. *See State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) ("Pretrial show-up identifications . . . , even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights."). Rather, "[a]n unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 106, 97 S. Ct. 2243, 2248 (1977)).

Here, trial court's challenged findings and conclusion—that the authorities substantially followed statutory and CMPD policies in each photo lineup and that the substance of any deviation from those policies revolved around defendant's neck tattoos—are supported by the evidence. Defendant fit Mr. Cintron's initial description of the perpetrator, which emphasized "a neck tattoo of an Asian symbol on the left side of his neck" as well as the "lining" or notable creases in the perpetrator's forehead. Based on this description, Mr. Cintron had the ability to identify defendant both in-court and in photographs reflecting a close-up view of defendant's tattoos, and he specifically testified to

his ability to recognize defendant as the perpetrator "independent of any lineup . . . or any photo" he had been shown. Thus, the trial court's ultimate conclusion—that the procedures used by the authorities did not give rise to a substantial likelihood that defendant was mistakenly identified as the perpetrator—is supported by the totality of the circumstances indicating that the identification was sufficiently reliable.

Because the totality of the circumstances supported the reliability of Mr. Cintron's in-court and out-of-court identification of defendant, we hold that the trial court properly denied defendant's motion to suppress identification evidence.

## III. Conclusion

Where officers did not conduct a warrantless search of defendant's home, and where the identification of defendant by the robbery victim was sufficiently reliable, the trial court properly denied defendant's motions to suppress.

AFFIRMED.

Judges DILLON and DAVIS concur.

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STATE OF NORTH CAROLINA
v.
KANDRA DORELL NICKENS, Defendant

No. COA18-45

Filed 6 November 2018

**1. Indictment and Information—sufficiency of indictment—resisting a public officer**

An indictment for resisting a public officer was sufficiently specific and facially valid where it identified the officer by name and office, the duties to be discharged by the officer, and the general manner in which defendant obstructed the officer. The indictment could have been more specific, but hyper-technicality is not required and this indictment identified the ultimate facts, allowing defendant to mount a defense.

**2. Police Officers—resisting a public officer—sufficiency of the evidence**

There was sufficient evidence of resisting a public officer where defendant became upset and began cursing in a driver's license office and a uniformed Division of Motor Vehicles inspector, who had arrest authority, attempted to escort her out of the office. Defendant argued that there was insufficient evidence that the inspector was discharging a duty of his office, but the evidence showed that the inspector discharged a duty falling within the scope of N.C.G.S. § 20-49 and N.C.G.S. § 20-49.1 and that defendant's conduct satisfied each element of resisting arrest.

**3. Indictment and Information—fatal variance—second-degree trespass—person in charge**

The Court of Appeals declined to invoke Appellate Rule 2 where a defendant who was charged with resisting arrest moved to dismiss because of a fatal variance between the indictment and the evidence at trial. Defendant failed to argue how any deficiency resulted in a manifest injustice and failed to argue how the purported error prevented the proper presentation of a defense.

**4. Trespass—implied consent—motion to dismiss**

The trial court properly denied defendant's motion to dismiss a charge of second-degree trespass where defendant refused to leave a driver's license office and became belligerent with employees. A Division of Motor Vehicles inspector revoked defendant's implied consent when he told defendant to leave the office.

**5. Trespass—second-degree—jury instructions—extra words included**

The trial court did not err in a second-degree trespass prosecution where the indictment alleged that a Division of Motor Vehicles inspector was a "person in charge" of the premises but the instruction included the additional words "a lawful occupant, or another authorized person." The list of people who can tell a defendant not to remain on the premises in the applicable statute was merely a disjunctive list of descriptors, not additional theories. Substantial differences in the extra descriptors used in this case could not be determined from the plain words of the statute.

**6. Constitutional Law—effective assistance of counsel—underlying issues—no error**

There was no ineffective assistance of counsel in a prosecution for resisting a public officer and second-degree trespass where defense counsel explicitly consented to a jury instruction and did not argue that there was a fatal variance between the indictment and the evidence. It was held elsewhere in the opinion that there was no error in the jury instruction and no fatal variance.

Appeal by defendant from judgment entered 10 August 2017 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 21 August 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.*

*The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.*

HUNTER, JR., ROBERT N., Judge.

Kandra Dorell Nickens ("Defendant") appeals from a 10 August 2017 judgment after a jury convicted her of resisting a law enforcement officer and of second-degree trespass. The trial court sentenced Defendant to a sentence of forty-five days, suspended with twelve months of special, supervised probation and seven days in the custody of the Harnett County Sheriff's Office. Defendant argues on appeal: (1) the indictment was insufficient in the charge of resisting a public officer; (2) the trial court erred by denying Defendant's motion to dismiss the charge of resisting a public officer; (3) the trial court erred by denying Defendant's motion to dismiss the charge of second-degree trespass, due to a fatal variance between the indictment and evidence offered at trial; (4) the trial court erred by denying Defendant's motion to dismiss the charge of second-degree trespass based on Defendant's lack of implied consent to be on the premises; (5) the trial court committed plain error instructing the jury on second-degree trespass; and, (6) Defendant received ineffective assistance of counsel.

We disagree, and hold (1) the indictment alleged sufficient facts for each element of the offenses charged; (2) the trial court did not err in denying Defendant's motions to dismiss the charges of resisting a public officer and second degree trespass based on a fatal variance and lack of implied consent; (3) the trial court did not err in its jury instructions; and, (4) hold defense counsel's performance did not constitute ineffective assistance of counsel.

## I. Factual and Procedural Background

On the morning of 12 January 2017, Defendant went to the North Carolina Division of Motor Vehicles ("NCDMV") Driver's License Office in Erwin, North Carolina, to update her address. Senior Examiner Melissa Overby ("Ms. Overby") assisted Defendant, asked for her driver's license, and told her to take a seat. Defendant, who was wearing a head scarf, complied. Ms. Overby informed Defendant her photo could not be taken if she was wearing the scarf. Ms. Overby then asked Defendant if she had a medical or religious reason for wearing the scarf, and Defendant said she did.

Ms. Overby provided Defendant a "head gear affidavit[]," on which Defendant could declare a medical or religious exemption, thus allowing her to wear the scarf in her license photo. Defendant told Ms. Overby she would neither sign the form nor remove her scarf. Defendant then "got upset" and told Ms. Overby she wanted someone else to take her picture. Ms. Overby told Defendant to have a seat in a nearby station until another examiner became available to assist her. Defendant grew more upset, and "started using some cuss words[.]"

Ms. Overby "realized it wasn't going anywhere" and turned to her computer to enter Defendant's driver's license number and enter a note in her file concerning the dispute. At that time, Defendant stood nearby "wanting her driver's license back." Ms. Overby was "listening to her, but not really listening to what she was saying because . . . at that point she is upset[.]" Defendant "kept getting louder and louder and louder[.]"

During this time, Inspector Brandon Wall of the NCDMV License and Theft Bureau ("Inspector Wall") was in his office in a separate part of the building when a loud voice drew his attention. A former detective with the Lee County Sheriff's office, Inspector Wall said the voice he heard, "piqued my law enforcement interest." Inspector Wall—dressed in his "Class B" uniform that included a badge, sidearm, and handcuff case—walked from his office to the public lobby of the NCDMV, where he saw Defendant "standing up, talking loudly." He saw Defendant creating a scene that left other customers in the lobby "in disarray" and "looking around, trying to figure out what was going on." Inspector Wall attempted to get Defendant's attention, was unable to do so, and subsequently approached her. Inspector Wall saw that Ms. Overby had Defendant's license in her hand.

Based on Defendant's loud talking and cursing, Inspector Wall told Defendant she needed to leave. Defendant replied "she was in a public building[, s]he wanted a real law enforcement officer[, and s]he wasn't

going to leave." Inspector Wall repeated that "she had to go." He reached to take Defendant's license from Ms. Overby. As Inspector Wall was telling Defendant to leave a second time, he touched Defendant's elbow to "guide her out." Angered by Inspector Wall's action, Defendant yelled at him, "get your f***ing hands off me." Inspector Wall pulled away and reiterated his request for Defendant to leave. His attempts to guide Defendant out of the building were polite, but firm, and the touching was not forceful in nature.

Inspector Wall again reached toward Defendant in an attempt to "guide her" out of the building. Defendant shoved Inspector Wall, and a "pushing match" ensued for "ten seconds to fifteen, twenty seconds." Inspector Wall began trying to effect an arrest. Defendant headed towards the front door, but Inspector Wall believed "that's not an option at this point[.]" As the two struggled, they became "locked up." Inspector Wall tried to restrain Defendant as she tried to get away, and Defendant "lash[ed] out at" Inspector Wall. Inspector Wall then "took [Defendant] down to the ground" and Defendant commented "get off of me" and "I want a real cop[.]" Inspector Wall replied, "I am a cop[,]" and other employees of the DMV told Defendant that Inspector Wall "was a cop as well."

Scared by the events, Ms. Overby called the police. An officer with the Erwin Police Department arrived and assisted Inspector Wall. Defendant was taken to a break room in the back of the building, where she was "still cursing, still yelling." During the struggle, Defendant bit Inspector Wall in the arm, and continued to yell at him and to resist. Inspector Wall also suffered an abrasion to his elbow. Throughout Defendant's interaction with Inspector Wall, she demanded a "real cop," and Inspector Wall and Ms. Overby told her Inspector Wall was, in fact, "police" and a "real cop."

On 20 February 2017, a grand jury in Harnett County indicted Defendant for one count each of assault inflicting physical injury on a law enforcement officer, resisting a public officer, and second-degree trespass. On 7 August 2017, the case came on for trial in Harnett County Superior Court. On 10 August 2017, a jury found Defendant not guilty of assault inflicting physical injury on a law enforcement officer, and guilty of resisting a public officer and of second-degree trespass. The trial court found Defendant to have a prior record level II for misdemeanor sentencing purposes; sentenced Defendant to 45 days in the custody of the Sheriff of Harnett County; and, suspended the sentence for 12 months of special, supervised probation, with an active term of seven days in the Sheriff's custody. Defendant gave oral notice of appeal.

## II. Jurisdiction

Our jurisdiction over an appeal from a final judgment of a North Carolina Superior Court is appropriate pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

## III. Standard of Review

### A. Sufficiency of the Indictment

When evaluating the sufficiency of an indictment, North Carolina law has established

> [t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. [W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. This Court review[s] the sufficiency of an indictment *de novo*. An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.

*State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations and internal quotation marks omitted, alterations in *Harris*).

### B. Motions to Dismiss

Our Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A denial of a motion to dismiss is proper if "there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* at 62, 650 S.E.2d at 33 (citation omitted). On a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-193, 451 S.E.2d 211, 223 (1994) (citation omitted).

### C. Ineffective Assistance of Counsel

"It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted). "Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881. "The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citations omitted).

### D. Plain Error

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

## IV. Analysis

### A. Sufficiency of the Indictment

**[1]** Defendant first argues the trial court lacked jurisdiction over the charge of resisting a public officer because the indictment was invalid on its face. Defendant contends the indictment is facially invalid because it (1) "fails to allege the public office held by Inspector Wall with sufficient specificity to allow [Defendant] to prepare a defense," and (2) "fails to fully and clearly articulate a duty that Inspector Wall was attempting to discharge."

Indictment Requirements

Under Section 15A-924(a)(5), an indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2017). "As a prerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge, although it need only allege the ultimate facts constituting each element of the criminal offense." *Harris*, 219 N.C. App. at 592, 724 S.E.2d at 636 (citations and internal quotation marks, and brackets omitted). "[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *Id.* at 592, 724 S.E.2d at 636 (citation omitted). Generally, "an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *Id.* at 593, 724 S.E.2d at 636 (citation omitted). Considering the general sufficiency of allegations, our Supreme Court has determined a warrant or bill of indictment must identify the officer—the person alleged to have been resisted, delayed or obstructed—by name; indicate the official duty he was discharging or attempting to discharge; and should point out, generally, the manner in which the defendant is charged with having resisted, delayed, or obstructed the officer. *State v. Smith*, 262 N.C. 472, 474, 137 S.E.2d 819, 821 (1964); *State v. Fenner*, 263 N.C. 694, 700, 140 S.E.2d 349, 353 (1965); *State v. Wiggs*, 269 N.C. 507, 512, 153 S.E.2d 84, 88 (1967); *State v. White*, 3 N.C. App. 443, 445, 65 S.E.2d 19, 21 (1968).

The indictment by which the Grand Jury charged Defendant alleges violations of: (I) N.C. Gen. Stat. § 14-37(c)(1), "ASSAULT PHYSICAL INJURY LEO"; (II) N.C. Gen. Stat. § 14-223, "RESISTING PUBLIC OFFICER"; and (III) N.C. Gen. Stat. § 14-159.13, "SECOND DEGREE TRESPASS." The indictment specifies:

> I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault Agent B.L. Wall, a state law enforcement officer employed by the North Carolina

> Division of Motor Vehicles who was discharging or attempting to discharge his official duties, by scratching and hitting the officer with her hands and biting the officer on the back of the arm, and inflicted physical injury on the officer.
>
> II. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did resist, delay and obstruct Agent B.L. Wall, a public officer holding the office of North Carolina State Law Enforcement Agent, by refusing commands to leave the premises, assaulting the officer, refusing verbal commands during the course of arrest for trespassing and assault, and continuing to resist arrest.
>
> III. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did without authorization remain on the premises of the North Carolina Division of Motor Vehicles Driver's License Office located at 125 W. Jackson Blvd., Erwin, N.C. 28339, after having been notified not to remain there by a person in charge of the premises, Agent B.L. Wall.

We first must assess whether the indictment sufficiently names the officer. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. In *State v. Powell*, for example, this Court considered the sufficiency of an indictment's specificity. 10 N.C. App. 443, 179 S.E.2d 153 (1971). We held because the warrant neither named the officer on its face nor named the defendant in the order of arrest, the warrant was insufficient, fatally defective, and void. *Id.* at 450, 179 S.E.2d at 158. In *State v. McKoy*, this Court held indictments "do not need to state the victim's full given name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person." 196 N.C. App. 650, 654, 675 S.E.2d 406, 409 (2009).

Here, in the first count, Inspector Wall is identified as "Agent B.L. Wall, a state law enforcement officer employed by the North Carolina Division of Motor Vehicles." In the second count, he is identified as "Agent B.L. Wall, a public officer holding the office of North Carolina Law Enforcement Agent." Both counts, taken together, provide Defendant with sufficient information to identify and locate Inspector Wall. Defendant relies on *State v. Swift* to support her argument, arguing

the indictment insufficiently identifies the officer. *See State v. Swift*, 105 N.C. App. 550, 414 S.E.2d 65 (1992). Such reliance is misplaced, however, because in *Swift* the indictment named the wrong officer. *See id.* at 552-53, 414 S.E.2d at 67. Unlike the indictment in *Swift*, the indictment here identifies the correct officer, by name, as the one who has been resisted, delayed, or obstructed. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Unlike *Powell*, where the warrant was insufficient, *see* 10 N.C. App. at 450, 179 S.E.2d at 158, we hold the indictment sufficient because it names the officer on its face, including initials and full last name. We likewise hold the specificity of the office held by Inspector Wall facially sufficient. Inspector Wall's identification in the first charge as "employed by the North Carolina Division of Motor Vehicles[,]" and in the second charge as "holding the office of North Carolina Law Enforcement Agent[,]" provides enough information to identify Inspector Wall by both name and employment.

We also must assess whether the indictment specifies the official duty Inspector Wall was discharging or attempting to discharge. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. In count two, the indictment charges Defendant with "refusing commands to leave the premises," "refusing verbal commands during the course of arrest for trespassing and assault[,]" and "continuing to resist arrest." In count three, the indictment specifies Defendant "did without authorization remain on the premises of the North Carolina Division of Motor Vehicles Driver's License Office located at 125 W. Jackson Blvd., Erwin, N.C. 28339, after having been notified not to remain there by a person in charge of the premises." We hold the charges specifically state the duties Inspector Wall was attempting to discharge, namely: commanding Defendant to leave the premises and arresting or attempting to arrest her when she failed to comply.

Finally, to determine whether the indictment is facially valid, we must assess whether it properly points out, in a general manner, the way Defendant is charged with resisting or attempting to resist or obstruct Inspector Wall. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Under Section 14-223, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2017); *see State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972) ("[T]he resisting of the public officer in the performance of some duty is the primary conduct proscribed by this section, and the particular duty the officer is performing while being resisted is of paramount importance and is material to the preparation of the defense[.]").

Therefore, we must determine whether Inspector Wall was acting within the scope of his duties in his interaction with Defendant.

North Carolina caselaw has not specifically addressed the scope of NCDMV officers' powers to arrest, and neither Defendant nor the State have cited to cases directly on point. N.C. Gen. Stat. § 20-49.1 states, in pertinent part:

> (a) In addition to the law enforcement authority granted in G.S. 20-49 or elsewhere, the Commissioner and the officers and inspectors of the Division whom the Commissioner designates have the authority to enforce criminal laws under any of the following circumstances:
>
> (1) When they have probable cause to believe that a person has committed a criminal act in their presence and at the time of the violation they are engaged in the enforcement of laws otherwise within their jurisdiction.

N.C. Gen. Stat. § 20-49.1(a) (2017). Defendant acknowledges in her brief that DMV Inspectors do have authority to enforce criminal laws "under certain limited circumstances."

N.C Gen. Stat. § 20-49.1(a) contains an expansive grant of power that vests DMV inspectors with "the same powers vested in law enforcement officers by statute or common law." N.C. Gen. Stat. § 20-49.1(a). While we recognize the legislature has narrowed the jurisdiction of DMV inspectors, Inspector Wall was acting under the authority given to him by N.C. Gen. Stat. § 20-49 at the time the disturbance began. *See* N.C. Gen. Stat. § 20-49 (2017). While not unlimited, Inspector Wall's authority exists in the office where he works. *See* N.C. Gen. Stat. § 20-49.1(a). Accordingly, we hold Inspector Wall was acting within the scope of his duties during his interaction with Defendant.

Based on the above, we hold the indictment facially sufficient. It identified Inspector Wall, by name and office; the duties to be discharged by Inspector Wall; and, the general manner in which Defendant obstructed Inspector Wall in the discharge of his duties. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Even though the indictment could have been be more specific, we decline to require that it be hypertechnical. *See Harris*, 219 N.C. App. at 592, 724 S.E.2d at 636. It identified charges against Defendant with ultimate facts allowing Defendant to sufficiently mount a defense. Accordingly, we hold the indictment was sufficiently specific and facially valid.

**B. Motions to Dismiss**

i. Resisting a Public Officer

**[2]** Defendant next asserts the trial court erred by denying Defendant's motion to dismiss the charge of resisting a public officer. Defendant argues the State presented insufficient evidence Inspector Wall was discharging a duty of his office at the time of Defendant's arrest.

The elements of resisting arrest are:

> 1) that the victim was a public officer;
>
> 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> 3) that the victim was discharging or attempting to discharge a duty of his office;
>
> 4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

*State v. Sinclair*, 191 N.C. App. 485, 488-89, 663 S.E.2d 866, 870 (2008) (citations omitted); *see also* N.C. Gen. Stat. § 14-223. This statute "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *Id.* at 489, 663 S.E.2d at 870. We must consider Section 14-233 and its elements in conjunction with the scope of authority established in Sections 20-49 and 20-49.1. It is clear Section 20-49.1 is dependent upon Section 20-49, as it defines "Supplemental police authority of Division officers," and is coextensive with the grant of authority delineated in Section 20-49. *See* N.C. Gen. Stat. §§ 14-223, 20-49, 20-49.1.

The State presented evidence at trial showing Inspector Wall discharged a duty falling within the scope of both Sections 20-49 and 20-49.1. The evidence also showed Defendant's conduct satisfied each element of resisting arrest. *See* N.C. Gen. Stat. § 14-223; *Sinclair*, 191 N.C. App. at 488-89, 663 S.E.2d at 870. As explained above, Inspector Wall was discharging his duty by commanding Defendant to leave the premises and arresting her when she failed to comply. Sections 20-49 and 20-49.1 delineate Inspector Wall's scope of authority, and define the limits of his authority as a "inspector[] of the Division [of Motor Vehicles]." N.C. Gen. Stat. § 20-49.1. It is clear from the evidence presented Inspector Wall

acted within the parameters established under both Section 20-49 and 20-49.1 when taken together.

Additionally, under Section 15A-401, "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." N.C. Gen. Stat. § 15A-401(b)(1) (2017). When Defendant refused to leave the premises of the DMV office, Inspector Wall had probable cause to believe Defendant committed a criminal offense. *See Parker v. Hyatt*, 196 N.C. App. 489, 497, 675 S.E.2d 109, 114 (2009) ("[T]he authority of the State to charge an offender would be subverted if an officer imbued with power to arrest was required to ignore the crime occurring in his or her jurisdiction."). Accordingly, we hold the trial court's denial of the motion to dismiss the charge of resisting a public officer was proper.

ii. Second-Degree Trespass

**[3]** Defendant next asserts the trial court erred by denying Defendant's motion to dismiss the charge of second-degree trespass, because of a fatal variance.

N.C. Gen. Stat. § 14-159.13 provides:

> (a) **Offense**. – A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:
>
> (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person . . . .

N.C. Gen. Stat. § 14.159.13 (2017).

Defendant argues there was a fatal variance between the allegation in the indictment and the evidence offered at trial. Specifically, Defendant contends the State did not present sufficient evidence Inspector Wall was "a person in charge of the premises" and therefore, the trial court should have granted Defendant's motion to dismiss this charge. However, Defendant concedes this issue was not preserved for appellate review at trial, and requests this Court to invoke Rule 2 to reach the merits of this argument.

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it

> upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2018).

"This Court repeatedly has held a [d]efendant must preserve the right to appeal a fatal variance." *State v. Hill*, 247 N.C. App. 342, 347, 785 S.E.2d 178, 182 (2016) (citations and quotation marks omitted). "If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue." *Id.* at 247, 785 S.E.2d at 182 (citation omitted); *see also* N.C.R. App. P. 10 (2018). This Court should only invoke Rule 2 in "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (citation omitted).

Defendant argues the State did not prove Inspector Wall was a "person in charge" for purposes of the trespass offense. N.C. Gen. Stat. § 14-159.13. Neither the statute itself nor prior caselaw address the definition of a "person in charge." N.C. Gen. Stat. § 14-159.13. "Charge" is defined as "to entrust with responsibilities or duties." Black's Law Dictionary 282 (10th ed. 2014). Defendant has failed to argue how a deficiency in additional evidence as to whether Inspector Wall was "person in charge" resulted in a manifest injustice to herself. Further, Defendant has failed to argue how this purported error prevented the proper preparation of her own defense against the crime charged. Thus, we are unpersuaded to invoke Rule 2 to address this issue.

iii. Lack of Implied Consent

**[4]** Defendant next asserts the trial court erred by denying Defendant's motion to dismiss the charge of second degree trespass, based on Defendant's lack of implied consent to be on the premises.

Under Section 14-159.13, generally, those who enter premises open to the public have the implied consent of the owner to remain. *State v. Marcoplos*, 154 N.C. App. 581, 582, 572 S.E.2d 820, 821 (2002); N.C. Gen. Stat. § 14-159.13 (2017). "If, however, the premises are open to the public, the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void." *Id.* at 582-583, 572 S.E.2d at 821-822 (citation omitted). "[O]ne who lawfully enters a place may be subject to conviction for trespass if he or she remains after being asked to leave by someone with authority." *Id.* at 583, 572 S.E.2d at 821-822; *see also* N.C. Gen. Stat. § 14-159.13.

The evidence at trial shows Defendant raised her voice and began swearing at the DMV employee who possessed her license. When Inspector Wall told Defendant to leave, he picked up Defendant's license and attempted to escort her out of the building. By telling Defendant to leave the office, Inspector Wall revoked Defendant's implied consent to remain. Inspector Wall's possession of Defendant's license did not prevent her from leaving the building. Inspector Wall picked up Defendant's license from Ms. Overby. Inspector Wall attempted to escort Defendant off the property with all of her possessions. Defendant's refusal to leave the premises and becoming belligerent with the DMV employees and Inspector Wall prevented her from retrieving her license. Further, Inspector Wall was established at trial as someone who fit the definition of a lawful occupant and authorized person. Accordingly we affirm the trial court's denial of the motion to dismiss.

### C. Plain Error, Jury Instruction

**[5]** Finally, Defendant asserts the trial court committed plain error in its jury instruction on second-degree trespass. Defendant asserts the trial court committed plain error by instructing the jury on additional theories of second-degree trespass not alleged in the indictment. Defendant argues the evidence showing Inspector Wall was a "person in charge of the premises" is insufficient to support a conviction on that theory alone. Defendant did not object and this argument was not presented at trial. However, because we hold the inclusion of the additional words is not erroneous, we do not need to employ a plain error analysis.

North Carolina Pattern Jury Instruction 214.31A describes four potential persons who can notify a defendant not to enter or remain on the premises: the owner, a person in charge of the premises, a lawful occupant, an authorized person. N.C.P.I. Crim. 214.31A (2015). Defendant was indicted for "remain[ing] on the premises . . . after having been notified not to remain there by a person in charge of the premises." In the case *sub judice*, the indictment specifically alleged Inspector Wall was a "person in charge" of the premises. However, the trial court instructed the jury to find Defendant guilty if she was told not to remain on the premises "by a person in charge of the premises, a lawful occupant or another authorized person."

However, the additional words "a lawful occupant, or another authorized person" do not constitute other disjunctive theories included in the jury instructions. Examining the statute's language, it is apparent the list of persons is merely a disjunctive list of descriptors, not additional theories.

> In the construction of statutes, the *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

*State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citation omitted); *see also United States v. Aguilar*, 515 U.S. 593, 615-16, 132 L. Ed. 2d 520, 538 (1995). An associative canon of statutory construction, *noscitur a sociis*, teaches "associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it." *City of Winston v. Beeson*, 135 N.C. 271, 280, 47 S.E. 457, 460 (1904).[1]

Here, the notification element of second-degree trespass "by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person" specifies a list appropriate to interpret using *ejusdem generis* and *noscitur a sociis*. *See* N.C. Gen. Stat. § 14-159.13; *Lee*, 277 N.C. at 244, 176 S.E.2d at 774. The descriptors define persons who could notify Defendant they were no longer authorized to remain on the premises, not additional theories. From the plain language of the statute, we cannot determine any substantive differences between the descriptors included in the jury instructions not alleged in the indictment. Accordingly, the trial court did not err in its jury instructions on second-degree trespass.

For the reasons discussed above, we hold the trial court did not err in its instructions to the jury on the charge of second-degree trespass by including other descriptors from the pattern jury instructions and in Section 14-159.13.

### D. Ineffective Assistance of Counsel

**[6]** Defendant argues she received ineffective assistance of counsel, violating her Sixth Amendment rights and Article 1, Section 23 of the North Carolina Constitution. Specifically, Defendant contends her counsel was ineffective because her counsel (1) explicitly consented to the jury instruction amounting to a misstatement of the law regarding

1. This case was reprinted in 1924, and paginated as 135 N.C. 192, 198 (Spring Term, 1904).

the specific duty Inspector Wall was discharging when he arrested Defendant; and (2) failed to argue there was a fatal variance between the allegation in the indictment and the evidence presented.

Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment of the United States Constitution guarantee criminal defendants the right to effective assistance of counsel at trial. *See* N.C. Const. art. I § 23; U.S. Const., Amend. VI; *see also State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985). "[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248; *see Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

In order to prevail on a claim of ineffective assistance of counsel ("IAC"), a "defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004); *see also Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Thompson*, 359 N.C. at 115, 604 S.E.2d at 876 (citations and internal quotation marks omitted).

> [T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Thompson*, 359 N.C. at 115, 604 S.E.2d at 876 (citations and internal quotation marks omitted). When our Court reviews an IAC claim, "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). "Because of the difficulties inherent in determining if counsel's conduct was within reasonable standards, a court must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance." *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (citing *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694).

Defendant asserts trial counsel explicitly consented to the jury instruction at the charge conference regarding the specific duty Inspector Wall was discharging when he arrested Defendant, and Defendant was

prejudiced by trial counsel's consent. Defendant contends the trial court's instruction, "[m]aking an arrest for criminal conduct, which occurs in his presence, is a duty of a Division of Motor Vehicles agent" is an erroneous statement of the law, and thus, there is a reasonable probability the jury would have reached a different result.

During the charge conference, Defendant's trial counsel discussed the correct language at length with the State and the trial court concerning the language used to define the specific duty Inspector Wall was attempting to discharge during Defendant's arrest. Defendant's trial counsel argued the trial court should not define a specific duty or impute a duty to Inspector Wall because whether he had a specific duty was a separate question of fact for the jury to decide. The record indicates trial counsel did object to one portion of the language in question:

> THE COURT: All right. I would be inclined to add that language out of abundance of caution, making an arrest for criminal conduct which occurs in his presence or preventing criminal conduct in a Division of Motor Vehicles office are duties of a DMV agent. State want to be heard any further about that?
>
> MR. PAGE: No, your Honor.
>
> THE COURT: Defense want to be heard any further?
>
> MR. KEY: Just note my exception to the second aspect of it.
>
> THE COURT: That's noted and overruled. All right.

At trial, counsel argued several times Inspector Wall did not have the authority to arrest Defendant. Defense counsel specifically questioned Inspector Wall about the power of a DMV inspector to arrest.

Defendant also argues her trial counsel should have argued the existence of a fatal variance between the allegation of second-degree trespass in the indictment and the evidence presented at trial. Because we previously held above the trial court did not err in its jury instructions and there was no fatal variance, both did not constitute a misstatement of the law or errors by counsel. Therefore, we hold Defendant's IAC claims are without merit, and Defendant did not receive ineffective assistance of counsel.

## V. Conclusion

For the reasons set out in our opinion above, we find no error committed at trial and affirm the conviction of Defendant for resisting a public officer and trespass in the second degree.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 NOVEMBER 2018)

| | | |
|---|---|---|
| BOSWELL v. BOSWELL<br>No. 18-462 | New Hanover<br>(16CVD361) | AFFIRMED IN PART AND REMANDED |
| CABLE v. SINK<br>No. 18-271 | Randolph<br>(13CVS2790) | Appeal dismissed. |
| CORE v. N.C. DIV. OF PARKS & RECREATION<br>No. 17-1402 | N.C. Industrial Commission<br>(TA-24656) | Remanded |
| COUSAR v. MARTIN<br>No. 18-268 | Forsyth<br>(16CVS5241) | Dismissed |
| ECMD, INC. v. GRUBBS<br>No. 18-377 | Guilford<br>(17CVS1383) | Dismissed |
| EVERETT v. DUKE ENERGY CAROLINAS, LLC<br>No. 18-159 | Wake<br>(16CVS7353) | Reversed in Part; Affirmed in Part. |
| FITNESS SOLUTIONS GRP., LLC v. JTG EQUIP. & SUPPLY CO., LLC<br>No. 18-313 | Wake<br>(16CVD13102) | Affirmed |
| HUDSON v. PASQUOTANK CTY.<br>No. 18-115 | Pasquotank<br>(16CVS414) | Reversed and remanded in part; affirmed in part |
| IN RE A.P.<br>No. 18-280 | Orange<br>(15JT88) | Affirmed |
| IN RE D.C., JR.<br>No. 18-482 | Swain<br>(16JA18-20) | Affirmed in Part, Reversed and Remanded in Part |
| IN RE E.W.P.<br>No. 18-183 | Avery<br>(13SPC68) | Affirmed |
| IN RE K.K.L-H.<br>No. 18-598 | Avery<br>(18JA12) | Affirmed in part; reversed in part; reversed and remanded in part |
| IN RE N.J.H.<br>No. 18-381 | Johnston<br>(15JT198) | Affirmed |

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| JONES v. BOYD<br>No. 18-198 | Catawba<br>(14CVS2977) | Affirmed |
| JONES v. WELLS FARGO BANK, NA<br>No. 18-245 | N.C. Industrial Commission<br>(15-711274) | Affirmed |
| McCAMMITT v. CHEN<br>No. 18-480 | Mecklenburg<br>(17CVD5297) | Dismissed |
| PEGUES v. MONROE<br>No. 18-162 | Sampson<br>(09CVD1585) | Vacated and Remanded |
| SHEN v. McGOWAN<br>No. 18-263 | Durham<br>(16CVD3981) | Affirmed |
| STATE v. AVERETTE<br>No. 18-227 | Pitt<br>(16CRS1393) | Affirmed |
| STATE v. BAKER<br>No. 18-70 | Lincoln<br>(15CRS53563) | No prejudicial error. |
| STATE v. BRADLEY<br>No. 17-1391 | New Hanover<br>(14CRS53046) | No Error |
| STATE v. COLES<br>No. 18-357 | Forsyth<br>(13CRS60689) | New trial. |
| STATE v. GARRISON<br>No. 18-156 | Wake<br>(15CRS219816) | NO ERROR IN PART; DISMISSED IN PART |
| STATE v. GILL<br>No. 18-191 | Durham<br>(15CRS57733) | Vacated and Remanded |
| STATE v. HAZEL<br>No. 18-266 | Forsyth<br>(16CRS2452)<br>(16CRS50882) | No Error |
| STATE v. HUDSON<br>No. 18-143 | Harnett<br>(15CRS51385-86) | No Error |
| STATE v. KEWISH<br>No. 18-214 | Wake<br>(12CRS219520) | No Error in Part, Vacated and Remanded in Part |
| STATE v. MASH<br>No. 18-68 | Wilkes<br>(16CRS51364)<br>(16CRS51647) | Affirmed |
| STATE v. MATLOCK<br>No. 18-101 | Onslow<br>(16CRS52047-48) | Remanded for Re-sentencing. |

| | | |
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| STATE v. McKOY<br>No. 18-152 | Johnston<br>(15CRS53962) | No Error |
| STATE v. MILLHOUSE<br>No. 17-1142 | New Hanover<br>(01CRS18969-78)<br>(01CRS25484-87)<br>(01CRS28577)<br>(02CRS4353) | Affirmed in part<br>and Vacated in part |
| STATE v. OCEGUEDA<br>No. 18-414 | Rockingham<br>(16CRS50085)<br>(16CRS51) | No Error |
| STATE v. PILKINGTON<br>No. 18-38 | Onslow<br>(15CRS57350-52)<br>(16CRS51123)<br>(16CRS51125) | No Error |
| STATE v. RAWLINSON<br>No. 18-325 | Greene<br>(16CRS50132) | Vacated and Remanded |
| STATE v. SATTERWHITE<br>No. 18-249 | Edgecombe<br>(16CRS51837) | No Error |
| STATE v. SISK<br>No. 18-211 | Transylvania<br>(16CRS50807) | No Plain Error |
| STATE v. SMITH<br>No. 18-529 | Mecklenburg<br>(16CRS226550)<br>(16CRS226551)<br>(16CRS226552)<br>(16CRS226554)<br>(16CRS226556)<br>(17CRS5918) | No Error |
| STATE v. WHITMIRE<br>No. 18-308 | Buncombe<br>(15CRS89331)<br>(15CRS89435)<br>(16CRS266) | No Error |
| STATE v. WILLIAMS<br>No. 16-684-2 | Wayne<br>(14CRS55045)<br>(15CRS551) | No Plain Error |
| STONEWALL CONSTR. SERVS., LLC<br>v. FROSTY PARROTT BURLINGTON<br>No. 18-171 | Alamance<br>(15CVS124) | Affirmed |
| STYLES v. STYLES<br>No. 18-257 | New Hanover<br>(17CVD833) | Affirmed |

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| THE GRANDE VILLAS AT THE PRES. CONDO. HOMEOWNERS ASS'N, INC. v. INDIAN BEACH ACQUISITION LLC<br>No. 18-218 | Carteret<br>(15CVS1415) | Dismissed |
| WOODLIEF v. CANAL WOOD, LLC<br>No. 18-447 | Franklin<br>(17CVD315) | Reversed |
| YOUNG v. YOUNG<br>No. 18-335 | Halifax<br>(15CVD1141) | Affirmed |

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